(1) Supreme Court, U.S.

No. 991045 DEC 16 1999

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In The

Supreme Court of the United States

BEAR LODGE MULTIPLE USE ASSOCIATION, A Wyoming Non-profit Corporation; ANDY PETEFISH, d/b/a/ TOWER GUIDES; GARY ANDERSON, KENNETH D. ALLEN, GREGORY HAUBER, and WES BUSH, Individuals;

Petitioners,

v.

BRUCE BABBITT, Secretary of the Interior; ROGER G. KENNEDY, Director of the National Park Service; KAREN WADE, Regional Director of the Rocky Mountain Region of the National Park Service; CHAS CARTWRIGHT, Superintendent of the Devils Tower National Monument; the NATIONAL PARK SERVICE; CHEYENNE RIVER SIOUX TRIBE; ROMANUS BEAR STOPS, BURDELL BLUE ARM, ARVOL LOOKING HORSE, and STEVEN VANCE;

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an individual or group directly affected by the federal government's abandonment of neutrality by its endorsement of religion on federal lands has standing to challenge that endorsement, or must that individual or group:

   a. Alter his or its behavior; or

   b. Suffer an economic injury?

2. When the federal government, in the abandonment of neutrality by its endorsement of religion on federal lands, threatens to deny access to federal lands if visitors do not adhere to the orthodoxy of the endorsed religion:

   a. Whether the federal government's threat constitutes coercion in violation of the Establishment Clause?

   b. Whether the federal government's threat, combined with its imposition of social pressure, constitutes coercion in violation of the Establishment Clause?

LIST OF PARTIES

Bear Lodge Multiple Use Association is a non-profit corporation organized under the laws of the State of Wyoming; it has no parent or subsidiary corporations. Andy Petefish is a private individual who provides climbing guiding services in the name of Tower Guides; Gary Anderson, Kenneth D. Allen, Gregory Hauber, and Wes Bush are all individuals and members of Bear Lodge Multiple Use Association. All were Plaintiffs before the U.S. District Court for the District of Wyoming and Appellants before the U.S. Court of Appeals for the Tenth Circuit.

The caption of the Petition contains the name of all the parties. Respondents named therein are joined in their official capacities, and they, or their predecessors, were Defendants before the U.S. District Court for the District of Wyoming and Appellees before the U.S. Court of Appeals for the Tenth Circuit. Roger G. Kennedy was replaced as Director of the National Park Service by Robert G. Stanton; John E. Cook was replaced as Regional Director of the Rocky Mountain Region by Karen Wade; and Deborah O. Liggett was replaced as Superintendent of Devils Tower National Monument by Chas Cartwright.

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Review is sought of the opinion of the U.S. Court of Appeals for the Tenth Circuit, *Bear Lodge Multiple Use Association, et al. v. Bruce Babbitt, et al.*, 175 F.3d 814 (10th Cir. 1999), affirming, on other grounds, the opinion of the U.S. District Court for the District of Wyoming, which Tenth Circuit opinion appears at pages 1 to 20 of the Appendix. The opinion of the District Court for the District of Wyoming, *Bear Lodge Multiple Use Association, et al. v. Bruce Babbitt, et al.*, 2 F.Supp.2d 1448 (D. Wyo. 1998), appears at pages 27 to 65 of the Appendix.

STATEMENT OF JURISDICTION

The Supreme Court of the United States has jurisdiction to hear this case under Article III of the United States Constitution and has the power to grant *certiorari* under 28 U.S.C. § 1254. The judgment sought to be reviewed was entered on April 26, 1999, by the U.S. Court of Appeals for the Tenth Circuit. Petition for Rehearing *En Banc* was denied on July 8, 1999. On November 9, 1999, Application For Extension Of Time To File Petition Until December 16, 1999, was granted.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Sections 1 and 2, of the United States Constitution and the First Amendment of the United States Constitution are involved in this Petition for *Writ of Certiorari*. App. 68.

STATEMENT OF THE CASE

On March 13, 1996, Bear Lodge Multiple Use Association and others (Bear Lodge) brought suit against Bruce Babbitt, Secretary, United States Department of the Interior, and other federal officials and agencies, challenging the Final Climbing Management Plan (CMP) issued by the Superintendent of the Devils Tower National Monument, which banned commercial and recreational climbing during the month of June at Devils Tower (June Climbing Ban). The suit was filed in the U.S. District Court for the District of Wyoming.

On June 8, 1996, the U.S. District Court for Wyoming enjoined the June Climbing Ban, holding that the June Climbing Ban, as applied to commercial climbers, violated the Establishment Clause "to the extent that it prohibits the issuance of commercial use licenses for guided climbing activities during the month of June . . . ." App. 39. As to recreational climbers, the District Court concluded, that the June Climbing Ban would violate the Establishment Clause "to the extent that it 'coerces' the support of some American Indians' religious practices by threatening mandatory closure to all climbing during the month of June." App. at 39. On August 12, 1996, Secretary Babbitt sought permission to revise the CMP, a request that the District Court granted on September 20, 1996.

In late November 1996, the National Park Service (NPS), after notice and opportunity for comment, reissued the CMP in final form. Under the Reconsidered CMP (RCMP), Secretary Babbitt abandoned the June Climbing Ban on commercial climbing but retained the June Climbing Ban on recreational climbing. On December 31, 1996, Bear Lodge filed their complaint challenging the constitutionality of the June Climbing Ban. After briefing, oral arguments were heard on April 18, 1997.

On April 2, 1998, the District Court denied Bear Lodge's motion for summary judgement, holding that the June Climbing Ban: (1) is voluntary; (2) serves a "secular" purpose; (3) does not have the effect of endorsing religion; and (4) accommodates the needs of Native Americans that non-believers not climb Devils Tower during June to ensure privacy. App. 59-64.

On April 10, 1998, Bear Lodge filed its Notice of Appeal. On March 10, 1999, after briefing, oral arguments were held before the U.S. Court of Appeals for the Tenth Circuit. Bear Lodge argued that the NPS ban: (1) is not voluntary because it has coerced climbers not to climb Devils Tower during June; (2) does not serve a "secular" purpose because the express purpose of the ban is to serve the religion of some Native Americans; (3) has the express purpose and effect of endorsing Native American religion, and (4) establishes rather than merely "accommodates" religion because Native Americans already enjoy unlimited access to Devils Tower.

On April 26, 1999, the Tenth Circuit held that Bear Lodge lacked standing to challenge the June Climbing Ban. As to Andy

Petefish, a commercial rock-climbing guide, the Tenth Circuit Court held that he "did not substantiate his claim of economic injury" and therefore had no standing. App. 18. As to the other individually named recreational climbers, the Tenth Circuit held that they "have established no injury in fact and therefore do not have standing." App. 18.

Although the Tenth Circuit Court never directly analyzed the standing of the Bear Lodge Association, it did analyze the standing of two Bear Lodge members. These recreational climbers signed sworn statements that they were coerced into not climbing in June as a result of the NPS's threats to take adverse action against climbers, including the threat of permanently banning recreational climbing in June. The Tenth Circuit held that these individuals "elected not to climb in June." App. 19. However, their "decision" not to climb did not give them standing because, according to the Tenth Circuit, "the possibility of mandatory closure is a remote and speculative possibility. . . . " *Id.* The Tenth Circuit claimed that it "did not reach" the Establishment Clause issues. App. 20.

On July 8, 1999, Bear Lodge filed a Petition for Rehearing *En Banc*. On August 18, 1999, the Tenth Circuit Court denied the Petition. App. 66.

On November 9, 1999, Bear Lodge requested an extension of time in which to file their Petition, which request was granted. This Petition for Writ of *Certiorari* follows.

STATEMENT OF FACTS

The NPS has recognized rock climbing at Devils Tower as "a legitimate recreational and historical activity" since Devils Tower became the first National Monument in 1906, due to the fact that climbing on Devils Tower does not violate the Antiquities Act or any other federal law. Devils Tower is internationally famous as a site for crack-climbing, attracting tens of thousands of climbers annually. Moreover, non-climbing visitors consider the opportunity to watch rock climbers one of the attractions of Devils Tower. For the five years before the June Climbing Ban was imposed, the month of June was the most popular time for climbing at Devils Tower.

On February 21, 1995, in response to the belief of some Native Americans that climbing at Devils Tower "seriously impaired the spiritual quality of the site" (App. 74), the NPS issued a Final Climbing Management Plan (FCMP) by which it sought to compel climbers to show "respect for the reverence many American Indians hold for Devils Tower as a sacred site." App. 72. The FCMP listed three indicia of "respect" that it sought to achieve: "climbers *will affect American Indian traditional beliefs* less and less throughout the years;" "climbers will not impact American Indian traditional cultural practices during the month of June;" and "climbers *will show respect for American Indian concerns* through their willingness to avoid climbing the tower in June." (Emphasis added) App. 80.

In late November 1996, after the U.S. District Court for the District of Wyoming issued an injunction barring implementation of the June Climbing Ban as to commercial climbers, the NPS, following notice and opportunity for comment, reissued the CMP in final form. Under the RCMP, the NPS abandoned its June Climbing Ban as to commercial climbing but retained the June Climbing Ban as to recreational climbing. "[The] voluntary closure of the Monument to technical rock climbing in the month of June . . . [is] based on a desire by NPS to accommodate American Indians tribal religious and cultural practices at the Monument." App. 81. The intent of the June closure is to ensure that "*climbers will show respect* for Native American concerns through their willingness to avoid climbing the tower in June." (Emphasis added) App. 80. Privacy is considered essential for the practice of many of the religious practices of some American Indians, including vision quests, the leaving of prayer offerings, sweatlodge rites, and the sun dance. App. 84.

Although the NPS describes its June Climbing Ban on climbing at Devils Tower as "voluntary," climbers and other visitors have told the NPS many times that the June Climbing Ban is coercive and mandatory, not "voluntary."[1]

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[1] There are dozens of different references in letters included in the Administrative Record that the "voluntary" closure is, in fact, mandatory. These letters submitted concerning the Reconsideration of the CMP are

Bear Lodge is not alone in its opposition to the June Climbing Ban and the demand of the NPS that climbers show "respect" for Native American religion. In a survey performed in June and July of 1992 by a group independent of the NPS, climbers were asked if their "views of climbing would change if they knew that Native Americans considered [Devils Tower] a sacred site and objected to climbing." App. 89. Sixty-seven percent said their view of climbing would not change out of respect for the religious beliefs of some Native Americans and "that they would continue to climb the tower." *Id.* Many of the climbers stated that they did not believe any conflict of use was present and "that their climbing in no way conflicted with Native American use." Moreover, "climber watching [is] a favorite activity" at Devils Tower.[2] Climbers believe that one of the legal and legitimate uses of Devils Tower is climbing. App. 90.

The NPS established criteria to determine if the "voluntary" June Climbing Ban is successful or whether it should be replaced in order to achieve what the NPS admits to be the NPS's "ultimate goal," that is, a year in which "*every climber* personally chooses not to climb at Devils Tower . . . " (Emphasis added) App. 76. Those indicia of a "successful" June Climbing Ban include "a continuous, significant reduction in the number of climbers on

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from 14 individuals and 2 climbing organizations and express the view that the June Climbing Ban is mandatory and coercive, not voluntary. Other letter writers describe the NPS's "voluntary" closure language as "a sham," "doublespeak," "Orwellian doublespeak," "mandatory ban with a phase in period," "ludicrous and untenable," "blackmail," "government doublespeak," "threats," "questionable," and "ambiguous."

[2] "On a daily basis we observed scores of tourists at the Visitor's Center and along the Tower Trial engaged in 'climber watching.' Thus, the climbers were part of the entertainment for other visitors to the monument. In fact, one NPS staff member as well as several local climbers told us that people came to Devils Tower for the expressed (SIC) purpose of watching the climbing. If this is indeed the case then the social (and indirectly the economic) impact which climbing has at [D]evils Tower would be considerable." Applied Ethnography at Devils Tower National Monument, Wyoming. Jeffery R. Hanson and David Moore, November 4, 1992, Page 8.

Devils Tower each June in comparison to the number of climbers from the previous June." *Id.*

The NPS has made clear what it will do if the "voluntary" June Climbing Ban is unsuccessful:

1. Revise the climbing management plan;
2. Reconvene a climbing management plan work group;
3. *Institute additional measures to further encourage compliance;*
4. *Change the duration and nature of the voluntary closure;*
5. *Convert the June closure to mandatory;*
6. Write a new definition of success for the voluntary closure. . . .

(Emphasis added) App. 77.

Although listed as one of the options available to the NPS in the event that the June Climbing Ban is unsuccessful, the mandatory closure of Devils Tower is given special mention by the NPS: If the benchmark criteria for success are not met over a period of time, *the closure could be mandatory*. App. 78. The NPS states why it set forth the option of a mandatory closure. "The mandatory closure language is present to show that [the NPS is] seriously committed to protecting a cultural resource and to acknowledge American Indian concerns."[3] *Id.*

In addition, the NPS has engaged in other activities to prevent visitors to Devils Tower from climbing in June. The NPS posted signs around Devils Tower indicating the religious significance of

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[3] The term "cultural" should be read "religious." " '[C]ulture' . . . is understood to mean the traditions, *beliefs*, practices, lifeways, arts, crafts, and social institutions of . . . an Indian Tribe." (Emphasis added.) "Regarding use and perception of use, we found that Native Americans perceive Devils Tower primarily as a *religious resource, as a sacred place or 'alter'(sic) where humans and spiritual worlds are blended and reinforced through ritual.*" Applied Ethnography at Devils Tower National Monument, Wyoming. Jeffery R. Hanson and David Moore, November 4, 1992, Page i. (Emphasis added.) Thus, "Traditional cultural activities" is a euphemism for the practice of religion.

the site and demanding that visitors not approach the base of the Tower. The NPS also issued press releases and other statements exerting pressure on visitors to obey the June Climbing Ban, and, to this day, actively promotes the ban on its official NPS website. The NPS also trains uniformed NPS personnel (some of whom are armed) to approach any would-be climbers to confront them about the "voluntary" ban. Through all of these means the NPS directly and indirectly communicates the message that visitors at Devils Tower must show respect for Native American religion by not climbing during June.

Bear Lodge Multiple Use Association is a Wyoming non-profit corporation dedicated to keeping public lands available for multiple use, as required under federal law. Two Bear Lodge members submitted sworn statements that they were coerced into not climbing at Devils Tower as a result of the June Climbing Ban.[4] Gary Anderson, Kenneth D. Allen, Gregory Hauber, and Wes Bush are Bear Lodge members who have climbed on Devils Tower for years and object to the June Climbing Ban. Andy Petefish owns and operates Tower Guides, a commercial guide service that organizes climbing expeditions on Devils Tower. Mr. Petefish objects to the June Climbing Ban as a violation of the Establishment Clause. In addition, Mr. Petefish presented evidence, in the form of a sworn affidavit and records of his business income, proving that the June Climbing Ban resulted in lost business to Tower Guides.[5] The evidence of his economic injury was uncontroverted.

Believing the June Climbing Ban to be a violation of the Establishment Clause requirement that the federal government maintain neutrality concerning matters of religion, Bear Lodge filed this action.

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[4] Declarations of Jim Black and Elane Bianco. App. 85-88.

[5] Declaration Of Andy Petefish In Support Of Plaintiffs Motion For Preliminary Injunction, April 29, 1996.

REASONS FOR GRANTING THE WRIT

I. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE TENTH CIRCUIT AND DECISIONS OF THIS COURT AND THE OVERWHELMING MAJORITY OF FEDERAL COURTS OF APPEALS REGARDING THE INJURY NECESSARY FOR STANDING IN AN ESTABLISHMENT CLAUSE CHALLENGE.

A. When An Individual Is Directly Affected By The Failure Of The Federal Government To Maintain Neutrality With Regard To Religious Activity On Federal Lands, His Or Her Objection Is Sufficient To Confer Standing Under The Establishment Clause.

This Court recognizes standing in the Establishment Clause context where those challenging government actions are "directly affected by the laws and practices against which their complaints are directed." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 n.22 (1982). However, there is among the Courts of Appeals an ever-widening split on whether the Establishment Clause requires that an individual change his or her behavior in response to the government's abandonment of neutrality to have standing to challenge that action. Furthermore, in this case the Tenth Circuit denied standing even to individuals who altered their behavior in response to the government's unconstitutional acts. This Court should grant this Petition to resolve the intolerable split among the Courts of Appeals and to ensure that Establishment Clause standing is determined in accordance with the decisions of this Court.

1. Decisions Of This Court Make Clear That An Objection By An Individual Directly Affected By The Failure Of The Federal Government To Maintain Neutrality Is Sufficient To Confer Standing.

Establishment Clause plaintiffs are "directly affected" where, for example, they are "subjected to unwelcome religious exercises" or are "forced to assume special burdens to avoid them." *Valley Forge Christian College v. Americans United for Separation of*

Church and State, Inc., 454 U.S. 464, 486 n.22 (1982) (internal citation omitted). This Court has made clear that individuals who are "directly affected" by Establishment Clause violations have standing to challenge those violations. *See, County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (recognizing standing of local residents to challenge religious displays on city and county property); *School Dist. Of Abington Tp., Pa. v. Schempp*, 374 U.S. 203 (1963) (recognizing Establishment Clause standing of school children and their parents "who are directly affected by the laws and practices against which their complaints are directed.").

Despite the clarity of the Establishment Clause holdings of this Court, the Tenth Circuit ruled that individuals who live near, visit, recreate, and work within Devils Tower and who object to the federal government's abandonment of neutrality regarding those public lands do not have standing. App. 18 to 19. The record is clear that all Bear Lodge parties are directly affected by the NPS's decision whether they are residents, visitors, climbers, or nonclimbers. Nonetheless, the Tenth Circuit held that they had no standing.

Because the Tenth Circuit's decision is in true, direct, intolerable, and irreconcilable conflict with the decisions of this Court regarding Establishment Clause standing, this Court should grant this Petition.

2. An Overwhelming Majority Of The Courts Of Appeals Has Held That An Objection By An Individual Directly Affected By The Failure Of The Federal Government To Maintain Neutrality Is Sufficient To Confer Standing.

The Fourth, Sixth, Tenth, Eleventh, and District of Columbia Circuits recognize Establishment Clause standing based solely on an allegation of direct personal contact with the offensive governmental action. *See, Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997) (finding that the injury giving an individual standing to bring an Establishment Clause claim is "unwelcome direct contact with a religious display that appears to be endorsed by the state."); *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986) (finding individual's appearance at city airport conveyed standing to challenge city's lease of airport space for use as a chapel); *Saladin v. City of Milledgeville*, 812

F.2d 687 (11th Cir. 1987) (recognizing standing because the challengers of the government's action were confronted directly by presence of word "Christianity" on city seal); *ACLU of Georgia v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983) (recognizing standing to bring Establishment Clause claim based on the individuals' state residency and their use of a state park); *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970) (finding residents' allegation that a local public park was being devoted to religious use was sufficient to confer standing).

Until the *Bear Lodge* decision the Tenth Circuit had agreed, in numerous decisions, with the majority of the Courts of Appeals, by recognizing an individual's standing under the Establishment Clause even where that person did not change his or her behavior in response to the government's unconstitutional abandonment of neutrality. *See, Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990) (finding individual had standing to bring an Establishment Clause claim based solely on the visual impact of seeing religious symbol on city logo); [6] *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 31 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973) (finding individuals had standing to challenge the existence of a granite monument of the Ten Commandments in city courthouse because they were city residents); *Bell v. Little Axe Ind. School Dist. No. 70*, 766 F.2d 1391, 1398 (10th Cir. 1985) (finding parents had standing to challenge religious meetings held at their children's school).

Notwithstanding this quarter century of legal precedent and contrary to nearly every other Court of Appeals, the Tenth Circuit, in *Bear Lodge*, held that the individually named recreational climbers had no standing to challenge the federal government's

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[6] In *Foremaster*, a city resident challenged the city's official logo, which contained a picture of the local Mormon temple, as a violation of the Establishment Clause. The Tenth Circuit held that the visual impact of seeing the religious symbol on the city logo "directly affected" the individual challenging the logo and gave him standing under *Valley Forge* despite his failure to contend that he changed his behavior in response to the unconstitutional governmental action.

abandonment of neutrality at Devils Tower because those climbers continued to climb Devils Tower despite the June Climbing Ban.[7]

Because the *Bear Lodge* decision of the Tenth Circuit is in true, direct, intolerable, and irreconcilable conflict with the overwhelming majority of the Courts of Appeals regarding Establishment Clause standing, this Court should grant this Petition.

3. At One Time One Circuit Had Held, And Now Two Circuits Have Held, That An Objection By An Individual Directly Affected By The Failure Of The Federal Government To Maintain Neutrality Is Not Sufficient To Confer Standing Until That Individual Changes His Or Her Behavior.

The Seventh Circuit has created a split among the Courts of Appeals as to whether an individual who challenges governmental action that violates the Establishment Clause must allege, not only that the governmental action directly affected him, but also that it caused him to alter his behavior. *See*, *Freedom From Religion v. Zielke*, 845 F.2d 1463 (7th Cir. 1988) (residents had no standing to challenge Ten Commandments display in city park because they did not allege a change in behavior); *ACLU v. City of St. Charles*, 794 F.2d 265, 269 (7th Cir. 1986), *cert. denied*, 479 U.S. 961 (1986) (finding plaintiff had standing to challenge a display of a lighted cross on public property not because the display deeply offended her, but because "she detours from her accustomed route to avoid the cross when it is lit.")

With its decision in *Bear Lodge*, the Tenth Circuit has now joined with the Seventh Circuit in holding that an individual who challenges governmental action that violates the Establishment Clause must demonstrate that he has altered his behavior in response to that unconstitutional action. The Tenth Circuit held that Bear Lodge Association members who were directly affected by the federal government's abandonment of neutrality at Devils

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[7] As to Bear Lodge Association, the Tenth Circuit held that it had no standing because its members either continued to climb or declined to climb out of a misplaced fear that the federal government would close Devils Tower if they did climb. App. 18-19.

Tower did not have standing because they had not altered their behavior as evidenced by the fact that they continued to climb. App. 18.

Because the holdings of the Seventh Circuit and now the Tenth Circuit create a true, direct, intolerable, and irreconcilable conflict with the decisions of this Court, and with the decisions of the overwhelming majority of the Courts of Appeals, this Court should grant this Petition.

4. The Now Ever Widening Split Among The Courts Of Appeals Cries Out For Resolution By This Court.

Recently, this Court declined the opportunity to address this everwidening split among the Courts of Appeals. In *City of Edmond v. Robinson*, 517 U.S. 1201 (1996), Chief Justice Rehnquist, joined by Justices Scalia and Thomas dissented from this Court's decision not to grant *certiorari* to consider the standing of city residents to challenge the constitutionality of a Latin cross on the City's official seal. "The *Foremaster* court acknowledged that there was a disagreement among the Courts of Appeals about whether *Valley Forge* allowed standing to a plaintiff alleging direct injury by being exposed to a state symbol that offends his beliefs. 882 F.2d, at 1490; see also *Freedom from Religion v. Zielke*, 845 F.2d 1463 (CA7 1988) (Finding this allegation insufficient); *Saladin v. City of Milledgeville*, 812 F.2d 687 (CA11 1987); *Hawley v. City of Cleveland*, 773 F.2d 736 (CA6 1985) (Finding it sufficient), cert. denied, 475 U.S. 1047, 106 S.Ct. 1266, 89 L.Ed.2d 575 (1986)." *Id.* Therefore, "[b]ecause there are serious arguments on both sides of this question, the Courts of Appeals have divided on the issue, and the issue determines the reach of federal courts' power of judicial review of State actions, I would take this opportunity to consider it." *Id.* Unfortunately, subsequent to this Court's decision not to grant *certiorari* in *City of Edmond*, yet another Court of Appeals has joined the split among the circuits on this issue. Now is the time for this Court to resolve the true, direct, intolerable, and irreconcilable split among the Courts of Appeals to prevent further Establishment Clause standing decisions in violation of the Constitution.

Because the Tenth Circuit's decision exacerbates the ever-widening split among the Courts of Appeals as to this critical standing issue in Establishment Clause cases, this Court should grant this Petition.

B. An Individual Who Is Directly Affected By The Failure Of The Federal Government To Maintain Neutrality With Regard To Religious Activity On Federal Lands Need Not Have Suffered Economic Injury To Have Standing To Maintain An Action Under The Establishment Clause.

This Court has held consistently that a showing of non-economic injury is sufficient to confer standing in Establishment Clause cases. *See*, *Wallace v. Jaffree*, 472 U.S. 38 (1985) (recognizing standing of parent of school children to challenge constitutionality of an Alabama school prayer law); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (finding local residents and individual members of the ACLU had standing to challenge the City's annual display of a crèche.) In fact, so clear are the holdings of this Court that no economic injury need be alleged or proved to maintain an action for a constitutional injury under the Establishment Clause that no other Court of Appeals has held as did the Tenth Circuit in *Bear Lodge*, that one alleging a violation of the Establishment Clause must demonstrate economic injury. As a result, the Tenth Circuit's decision in *Bear Lodge* is in true, direct, intolerable, and irreconcilable conflict, not only with the holdings of this Court, but also with the holdings of every other Court of Appeals.

The Tenth Circuit held that Andy Petefish lacked standing to bring an Establishment Clause claim because he failed to prove that he suffered any economic injuries as a result of the June Climbing Ban.[8] App. 18. Not only did the Tenth Circuit ignore the

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[8] Mr. Petefish presented uncontroverted evidence that he had lost business as a result of the June Climbing Ban, including a sworn statement and a summary of his business income both before and after the June Climbing Ban took effect. Moreover, the Tenth Circuit completely ignored the NPS's own admission that the June Climbing Ban "achieved an 85

economic injury suffered by Andy Petefish, it also ignored the non-economic injuries suffered by Mr. Petefish, namely, the direct effect on and ardent opposition by him to the federal government's refusal to maintain neutrality regarding visitor use of Devils Tower. Under the long line of Establishment Clause cases, there is no question that Mr. Petefish's regular and continuing use of Devils Tower as a nearby resident, as an almost daily visitor, as a climber, and as a climbing guide, as well as his continuing and fervent objection to the failure of the federal government to maintain neutrality at Devils Tower give him the "personal stake in the controversy" necessary for standing to challenge the NPS's June Climbing Ban. *See, Valley Forge,* 454 U.S., at 491.

Because the Tenth Circuit's decision denying Mr. Petefish standing, notwithstanding his clear Establishment Clause injuries, creates a direct and intolerable conflict with decisions of this Court, as well as with decisions of every other Court of Appeals, this Court should grant this Petition.

C. When Any Member Of A Group Is Directly Affected By The Failure Of The Federal Government To Maintain Neutrality With Regard To Religious Activity On Federal Lands, That Individual's Objections Are Sufficient To Confer Group Standing Under The Establishment Clause.

This Court has held that an association has standing to sue on behalf of its members, even in the absence of an injury to itself, under the following circumstances: (1) when its members have standing to sue in their own right; (2) when the interests it seeks to protect are germane to the organization's purpose; and (3) when neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333 (1977). Thus, all that is necessary is that the group represent some of its

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percent compliance rate in its first year . . . as a show of respect for American Indians who consider the tower sacred." App. 70. The NPS did not even attempt to refute that the 85 percent compliance was both a cause and graphic demonstration of Mr. Petefish's economic injury.

individual members who are affected. In fact, an organization's standing may be based entirely on the injuries suffered by a single individual member. *See, Warth v. Seldin*, 422 U.S. 490, 511 (1975).

Notwithstanding the clear standard set by this Court for associational standing, the Tenth Circuit appears to have held that members of the Bear Lodge Association had failed to identify "any personal injury suffered by them as a result of the alleged constitutional error." App. 19. Although it did not expressly state its reasoning,[9] the Tenth Circuit apparently concluded that Bear Lodge Association lacked standing because it could not meet the first prong of the *Hunt* test.

In its holding, the Tenth Circuit ignored the fact that Bear Lodge Association, on behalf of its members, had opposed, consistently and repeatedly, the June Climbing Ban and other NPS activities to restrict access to public lands, including Devils Tower, on the basis of religion. Bear Lodge Association filed comments and participated in meetings conducted by the NPS to express its belief that the NPS abandonment of neutrality at Devils Tower violated the Establishment Clause. As a result, under the numerous holding is cited above, including, but not limited to, *Wallace v. Jaffree, Hunt v. Washington State Apple Advertising Comm.*, and *Warth v. Seldin*, the Tenth Circuit's decision regarding the standing of Bear Lodge Association is in direct and intolerable conflict with the decisions of this Court and nearly every other Court of Appeals.

Moreover, Bear Lodge Association has standing, on behalf of its members, because its members are "directly affected" by the June Climbing Ban, due to the fact that they object to the closure of public lands on the basis of religion in violation of the Establishment Clause. Bear Lodge Association members are not just climbers, but also comprise hundreds of residents of this rural area of Wyoming, who frequently visit and use Devils Tower. Although some of the Association's members may not climb themselves, they enjoy watching others climbing, including during the most

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[9] In its *Bear Lodge* opinion, the Tenth Circuit devotes only two very brief paragraphs to its holding regarding standing. App. 18-19.

popular month for climbing, that is before the June Climbing Ban. Moreover, as users of public lands in this remote area of Wyoming, they object to the closure of public lands on the basis of religion in violation of the Establishment Clause. Clearly, under the holdings of this Court, Bear Lodge Association has standing to challenge the failure of the federal government to maintain neutrality with regard to visitor use of Devils Tower.

Furthermore, Bear Lodge Association has members who are climbers, some of whom object to the June Climbing Ban and were coerced into not climbing and some of whom object to the June Climbing Ban but chose to climb notwithstanding the threats of the federal government to make its June Climbing Ban mandatory if climbers continued to climb in June. As demonstrated above, all of these climbers are directly affected by the June Climbing Ban and thus have standing under the decisions of this Court and the overwhelming majority of the Courts of Appeals. The fact that they are "directly affected" by the June Climbing Ban gives them standing. Even if members of Bear Lodge Association were required to change their behavior in response to the federal government's unconstitutional action to have standing to challenge that abandonment of neutrality, and they are not required to change their behavior under the holdings of this Court and the overwhelming majority of the Courts of Appeals, some of them did alter their behavior.

Thus, Bear Lodge Association has standing on behalf of its members because all of its members, whether coerced climbers, continuing climbers, or nonclimbers, were directly affected by the June Climbing Ban. All of those members continue to object to the June Climbing Ban, as does the Association on their behalf.

Because the Tenth Circuit decision is in conflict with the holdings of this Court and every other Court of Appeals, this Court should grant this Petition.

II. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE TENTH CIRCUIT AND DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS OF APPEALS REGARDING WHAT CONSTITUTES COERCION IN AN ESTABLISHMENT CLAUSE CHALLENGE.

A. When An Individual Engages In The Conduct Of Religious Orthodoxy Demanded By The Federal Government, That Individual Has Not Surrendered His Or Her Constitutional Objections To The Demands Of The Federal Government For Adherence To That Religious Orthodoxy.

This Court has made clear that coercive governmental practices violate the Establishment Clause. "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so." *Lee v. Weisman*, 505 U.S. 577, 592 (finding "what to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."); *Abington v. Schempp*, 374 U.S. 203, 224 n.9 (1963) (finding that coercion can be a basis of an Establishment Clause claim); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (finding that the government violates the Establishment Clause when it applies its "power, prestige and financial support" to a particular religious belief because the indirect coercive pressure upon religious minorities to conform . . . is plain").

All other Courts of Appeals are in accord. "The degree of involuntariness needed to invoke the Establishment Clause is exceedingly low, and includes subtle and indirect pressure." *Herndon v. Chapel Hill-Carrboro City Bd. Of Educ.*, 89 F.3d 174, 180 (4th Cir. 1996), *cert. denied sub nom. See also, Kerr v. Farrey*, 95 F.3d 472, 479 (7th Cir. 1996) (finding "a coercion-based claim indisputably raises an Establishment Clause

question"); *Ceniceros By and Through Risser v. Board of Trustees of San Diego Unified School Dist.*, 66 F.3d 1535, 1547 (9th Cir. 1995) (finding "voluntary" religious activity "is fraught with the dangers of subtle coercion, misperception, and endorsement" that run afoul of the basic constitutional principle of separation of church and state).

Thus, an individual exposed to or forced to participate in acts respecting religion is "directly affected" by the government's unconstitutional action. Furthermore, that individual's acquiescence to government pressure to behave in "respectful" ways does not mean that he or she is not "directly affected" and offended by the government's unconstitutional acts. The government's coercive pressure deprives the individual of his or her ability to act of his or her own volition. Therefore, nothwithstanding an individual's apparent "voluntary" compliance with state-sponsored religious orthodoxy, the individual retains the right to challenge the constitutionality of the government's endorsement of that orthodoxy.

Application of this reasoning and the decisions of this Court and every other Court of Appeals to the June Climbing Ban makes it clear that the coerced climbers have standing to challenge the federal government's actions at Devils Tower. Nonetheless, the Tenth Circuit ruled that the two climbers who testified that they did not climb had not been coerced, despite their testimony to the contrary.[10] Not only did the Tenth Circuit ignore that sworn testimony, it ignored all that the NPS had done to elicit the response of those two climbers, that is, to stop any and all climbing in June. Those actions by the NPS included the placement of signs discouraging climbing; public announcements against climbing; a web-site that warned against climbing; threats to close Devils Tower for failure to

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[10] The Tenth Circuit implies that the climbers' refusal to climb was voluntary by concluding that their fear of a mandatory and permanent climbing ban was "remote and speculative." App. 19. Yet, such is the "power [and] prestige" of the government that this Court has held that any such endorsement is coercive. So important is the Establishment Clause that the federal government must avoid any conduct that has the coercive effect seen at Devils Tower.

observe the official June Climbing Ban; testimony by NPS officials that they had the power to close Devils Tower permanently; and even one-on-one confrontations between armed and unarmed NPS employees and prospective climbers. Finally, the Tenth Circuit ignored the fact that nearly ninety percent of June climbers stopped climbing in June despite the fact that over two-thirds of climbers polled before the June Climbing Ban took effect stated that they would continue to climb even knowing that Native Americans consider doing so a sacrilege.[11] Obviously, it was not "respect" for Native American religion that caused these climbers to comply with the NPS June Climbing Ban, but fear of the coercive "power [and] prestige" of the federal government.

Because the Tenth Circuit's holding is in direct and intolerable conflict with the holdings of this Court and the holdings of every other Court of Appeals as to what constitutes coercion for purposes of the Establishment Clause, this Court should grant this Petition.

B. When The Federal Government Demands Adherence To Religious Orthodoxy By Threatening To Close Public Lands In The Absence Of Such Adherence, That Action Constitutes Coercion In Violation Of The Establishment Clause.

This Court has struck down several other coercive governmental programs aimed at promoting "respectful" behavior or demanding demonstrations of religious belief. *See, West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943)

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[11] For many Jews and Christians, treating Devils Tower as "sacred" violates the First of the Ten Commandments: "Thou shalt have no other gods before me. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth: Thou shalt not bow down thyself to them, nor serve them . . . " Exodus 20: 3-5, *Bible, King James Version.* Further, the New Testament states as follows: "Who changed the truth of God into a lie, and worshipped and served the creation more than the creator, who is blessed for ever." Romans 1:25, *Id.*

(finding compulsory flag salute exercise was an unconstitutional coercion of belief); *Torcaso v. Watkins*, 367 U.S. 488, 495-96, (1961) (finding public employment may not be conditioned on one's willingness to subscribe to particular religious principles or to any religious belief at all); *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that the government's treatment of a "voluntary" graduation ceremony was coercive and violated the Establishment Clause).

If the demand by government to salute the flag, to register one's faith to obtain work, or to consent to religious ceremonies at a high school graduation ceremony constitutes unconstitutional coercion, the federal government's demand that climbers "respect" Native American religion by conforming to the June Climbing Ban is unconstitutional coercion. The NPS has made clear its objective: "the voluntary closure will be fully successful when *every climber* personally chooses not to climb . . . This is the ultimate goal of the [June Climbing Ban]." (Emphasis added) App. 76. Moreover, the NPS has made it clear, in official documents and in the testimony of its officials, that it will do everything necessary to achieve its objective, including closing Devils Tower to climbing year around, on a permanent basis. In fact, the NPS threatened to adopt a mandatory, year-round closure, to show that the NPS is "seriously committed to protecting a cultural resource and to acknowledge American Indian concerns." App. 78. Moreover, in its official document the NPS set forth a very low threshold as to what would trigger a permanent, year around closure: "an increase, *no change, or insignificant decrease in the number of climbers on Devils Tower each June* in comparison to the number of climbers from the previous June." (Emphasis added) App. 76.

The record demonstrates conclusively that all the climbers were well aware of and most opposed the June Climbing Ban. They were aware, as well, of the clear and publicly stated intent of the NPS to do everything possible to end all climbing

during June at Devils Tower.[12] Not surprisingly, the climbers took the federal government at its word: if climbing did not end during June, the NPS would permanently close Devils Tower to climbing. As a result of that fear, climbers were coerced into not climbing. In fact, the District Court took judicial notice of the NPS's goal of eliminating all climbing at Devil's Tower during June and opined, "a complete elimination of climbing from the Tower in the month of June would serve as powerful evidence of actual coercion." App., at 61, FT. 7. Bear Lodge Association even submitted uncontroverted evidence of such "actual coercion" in the form of two sworn affidavits of its members who testified that they did not climb because, as one member stated, "I do not want to be responsible for causing the NPS to adopt a mandatory closure or a closure that is longer than the June 'voluntary' closure." Declaration of Jim Black. App. 85-86.

According to the NPS, within two years after implementing the June Climbing Ban, the NPS boasted that it had achieved an 85 percent compliance rate. In 1999, the compliance rate climbed further to 88 percent. The evidence cited above, that climbers would not change their behavior out of "respect" for Native American religion, demonstrates that climbers have stopped climbing for one reason: they fear retaliation by the federal government. That fear is justified by the record.

Remarkably, the Tenth Circuit ignored this comprehensive, compelling evidence that the federal government was engaged in coercion of visitors to Devils Tower to ensure that visitors showed "respect" for Native American religion. As to the threatened mandatory ban, the Tenth Circuit found that threat to be "remote and speculative." App. 19. The Tenth Circuit reached that holding despite the fact that the synonym for "remote" is "slight" and the synonym for "speculative" is "theoretical."[13] The NPS's threat to close Devils Tower to climbing was far from "slight" and it was certainly more than merely "theoretical."

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[12] Not all climbing will end. Native Americans will be able to climb during June as part of their vision quest.

[13] Webster's New Collegiate Dictionary, 1981.

When the NPS specifically stated that it would "institute additional measures to further encourage compliance," and "change the duration and *nature*" of the closure, and, most tellingly, "convert the June closure to mandatory" (App. 78), it was not engaging in "theoretical" speculation about a possibility that was only "slight." It was telling the public, in an official document, what it would do if the public did not observe the June Climbing Ban. The NPS's repeated affirmations of its ability to close Devils Tower to climbing, in conjunction with its active campaign to coerce climbers to stay off Devils Tower in June, made clear the NPS's intention to take whatever action necessary, including closure, to achieve its goal of zero climbing in June. Furthermore, given the fact that the federal government, in official documents, in sworn testimony, and in the person of uniformed officers, many armed with guns, on federal land, boldly asserted its intent to achieve its objective of ending all climbing at Devils Tower, it is clear that coercion took place at Devils Tower with regard to the June Climbing Ban.

This Court has suggested that coercion under the Establishment Clause "may not be limited to the context of schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). In other settings, this Court has found clear constitutional violations as a result of "the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). *See, Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) (freedom of association); *Keyishian v. Board of Regents*, 385 U.S. 589, (1967) (freedom of speech); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (freedom of speech); *Baggett v. Bullitt*, 377 U.S. 360 (1964) (freedom of association).

Similarly, the Ninth Circuit held that the government's mere threat to enforce a regulation was sufficient grounds for a party to challenge the regulation as a violation of First Amendment rights. *See, Sable Communications of California, Inc. v. F.C.C.*, 827 F.2d 640 (9th Cir. 1987) (finding plaintiff's fears that the government would enforce a regulation against him were not "too speculative to warrant the invocation of federal jurisdiction" where the FCC threatened to enforce that regulation). *See also, Sable Communications of California, Inc. v. Pacific Tel & Tel. Co.*, 890 F.2d 184, 188

(1989) (finding the government's "attempted use of the rule as the . . . instrument of compulsion necessarily gives appellees standing to challenge the constitutional validity of the rule.").

This Court and at least one Court of Appeals have held that government threats that infringe First Amendment rights, including those embodied in the Establishment Clause, give the threatened parties constitutional standing. As a result, the Tenth Circuit's decision regarding the NPS's threat to close Devils Tower to climbing is in true, direct, intolerable, and irreconcilable conflict with the decisions of this Court and other Courts of Appeals.

Because the decision of the Tenth Circuit is in direct and intolerable conflict with the decisions of this Court, and other Courts of Appeals, this Court should grant this Petition.

C. When The Federal Government Demands Adherence To Religious Orthodoxy By Exerting Social Pressure In The Absence Of Such Adherence, That Action Constitutes Unconstitutional Coercion.

This Court has made clear that coercion under the Establishment Clause includes imposition of social pressure. *Lee v. Weisman*, 505 U.S. 577, 578, 592 (1992) (finding that the government "may no more use social pressure to enforce orthodoxy than it may use direct means."); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (finding that the government violates the Establishment Clause when it applies its "power, prestige and financial support" to a particular religious belief because "the indirect coercive pressure upon religious minorities to conform . . . is plain."). As noted above, *supra* at 17-18, the Courts of Appeals are in accord.

The NPS not only directly applied its "power . . . and financial support" to compel compliance with the June Climbing Ban, it engaged in an aggressive nationwide campaign to apply its "prestige" so as to impose social and public pressure on climbers, including the climbers in this case, to "show respect" for the religious beliefs of Native Americans. In 1995, the NPS issued an official press release designed to promote the June Climbing Ban. In the press release, the NPS referred to the 85 percent elimination of June climbers as an "auspicious beginning" and Superintendent Deborah Liggett stated that the NPS expected "an even higher rate

of compliance next year." In the press release the NPS boldly proclaimed that the June Climbing Ban "was initiated as a show of respect for American Indians who consider the tower sacred" and referred disparagingly to anyone climbing in June as those who "chose not to respect the voluntary closure." The NPS even singled out Andy Petefish for special abuse, noting that, although "[e]ight out of the nine licensed commercial climbing guides at the tower chose to respect the voluntary closure" "[a] single commercial climbing guide and the parties who accompanied him accounted for approximately one third of the climbing activity during June." App. 70-71. Clearly, this comment was meant to publicly rebuke Andy Petefish and to cause him to be subjected to abuse by the public. Moreover, by demonstrating how the federal government treated Mr. Petefish for his failure to "respect" the religion of Native Americans and the June Climbing Ban, the NPS sought to warn others of the disfavorable light in which they would be held if they opposed or did not adhere to the June Climbing Ban.

The NPS issued other similar official statements designed to create social pressure on would-be climbers to discourage them from even considering climbing in June "out of respect to American Indians who practice religious ceremonies that coincide with the summer solstice."[14] In a recent article, Superintendent Chas Cartwright boasted about the NPS's achievement of an "unprecedented" 85 percent compliance rate with the June Climbing Ban as a demonstration that "[w]e have respect for the reverence many American Indians hold for Devils Tower as a sacred site."[15]

The efforts of the NPS to generate favorable nationwide publicity, so as to impose greater social pressure on would-be climbers has yielded results in scores of high profile articles across the country. All of these articles have two things in common. First, the NPS casts itself in a very favorable light for showing "respect"

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[14] *The Wyoming Pioneer*, "Voluntary Climb Ban at Devils Tower At Highest Compliance." July 8, 1999.

[15] *Indian Country Today*, Week of March 28, 1996. "Devils Tower's Spring Closure Draws Lawsuit." Impliedly, those who do not conform with the June Climbing Ban are hateful people who have no "respect" for the religion of Native Americans.

for Native American religion. Second, those who oppose or ignore the NPS's June Climbing Ban are held up to public scorn as narrow-minded, intolerant, bigoted people who are unwilling to show just a little "respect [for] the voluntary closure." App. 70. For example, the NPS specifically targets and criticizes those who dare ignore the June Climbing Ban: "Our primary disappointment is of the six commercial climbers who work the tower, up until this year, five of those groups were complying with the voluntary closure. Now that's down to three." "We'd like to do better . . . All we can do is educate. It's totally based on *good faith and understanding*." (Emphasis added.)[16]

Not surprisingly, anyone who climbs in June is subjected to the chiding condemnation of those members of the media who pile on in response to the NPS's well-oiled media campaign: "Is [Petefish] furthering the cause of *peace and understanding*? I don't think so." *Newsweek*, "Separation of Rock and State." May 20, 1996. (Emphasis added); "[A] few rock climbers who use Devils Tower think it is unconstitutional to ask them not to disrupt the religious ceremonies of Indians worshiping there." "It's a strange notion to think our Constitution prohibits government from asking people to respect each other's religious beliefs." *Rocky Mountain News*, "Respecting Sacred Sights." May 18, 1997; "Andy Petefish and his Colorado climbing club are being totally *insensitive, selfish and greedy (or inordinately ignorant)* by insisting on violating these rights." *The Denver Post*, Editorial of Frances Stark, July 19, 1998. (Emphasis added.)[17]

Through all of these means, the NPS has successfully communicated its message that the federal government expects visitors at Devils Tower to show "respect" for Native American religion by not climbing during June, and that anyone who does not show "respect" is mean-spirited and self-indulgent. Thus, the NPS

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[16] *Casper Star-Tribune*, "Anti-climbing policy has little effect." July 5, 1998.

[17] The public pressure that the NPS exerted through the media upon would-be climbers was in addition to the pressure that the NPS imposed through other climbers who feared that any climbing in June would result in a mandatory, year-round ban. App. 85-88.

applied its "prestige" in order to place "indirect coercive pressure [on climbers] to conform" to the religious orthodoxy of respecting the "sacredness" of Devils Tower. *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Nonetheless, the Tenth Circuit failed to hold that this imposition of coercive social pressure is the type of governmental actions that gives rise to standing to bring an Establishment Clause challenge, contrary to the holdings of this Court and the Courts of Appeals.

Because the Tenth Circuit's decision is in true, direct, intolerable, and irreconcilable conflict with the decisions of this Court and every other Court of Appeals, this Court should grant this Petition.

III. THIS CASE INVOLVES A MATTER OF EXCEPTIONAL CONSTITUTIONAL IMPORTANCE THAT REQUIRES RESOLUTION BY THIS COURT DUE TO THE TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT BETWEEN THE DECISION OF THE TENTH CIRCUIT AND THE CONTROLLING DECISION BY THIS COURT.

A. This Case Involves A Matter Of Exceptional Constitutional Importance, That Is, Whether Federal Land May Be Closed To The Public Because It Is Considered "Sacred."

One-third of the land in this country is owned and managed by the federal government.[18] Much of that land is in the West. In many western states, the federal government is, if not the owner of a majority of the land, the largest single landowner. For example, fifty percent of the State of Wyoming, where this action originated, is owned by the federal government.[19] Sixty-four percent of the State of Utah, also within the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, is owned by the federal government.

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[18] "One Third of the Nation: the Federal Land Law Review Commission Report."

[19] Bureau of Land Management, Department of the Interior, Public Land Statistics, 1998. Table 1-3.

Id. The amount of land owned by the federal government in the other nine western states ranges from a low of 28 percent (Colorado) to a high of 82 percent (Nevada). *Id.* Moreover, within these states, the federal government is the overwhelming majority landowner in many, if not most, rural counties. For example, in Wyoming's Teton County, 93 percent of the land is owned by the federal government. In Montana's Lincoln County, 78 percent of the land is owned by the federal government.

Because virtually all of what is today the United States was once populated by indigenous peoples, nearly all of the land owned and managed by the federal government was at one time home to Native Americans. In addition, because the religion of many, if not most, Native Americans is land based, virtually any portion of the land owned and managed by the federal government could be considered "sacred."

Western states, and particularly rural western counties, use and rely upon land owned and managed by the federal government for recreational and economic activity. In fact, land owned by the United States provides the economic mainstay of the overwhelming majority of rural western counties, supporting as it does such diverse activities as tourism, forestry, ranching, mining, and oil and gas exploration and development. Without the access to lands owned by the United States that federal law permits and has permitted for more than a century, many rural western counties would be devastated.

Thus, if the action taken by the United States here, that is, closure of federal land to economic and recreational activity because of the beliefs of some Native Americans that the federal land in question is "sacred" is permitted to stand the consequences to westerners, particularly rural westerners, would be significant and far reaching. In fact, the federal government has taken and is continuing to take such action in various locations throughout the western states. For example, in the Santa Fe National Forest in New Mexico, the federal government rejected a long standing plan to expand a ski area

because the federal land is considered "sacred."[20] In the Bighorn National Forest in Wyoming, all of Medicine Mountain has been set aside for management as a "sacred site," thus ending all forestry activity upon which a nearby town relies for jobs and for the preservation of a healthy forest.[21] In the Lewis and Clark National Forest in Montana, more than 700,000 acres of federal land that has remarkable and unparalleled potential for oil and gas development has been closed to all such economic activity out of concern for "the religious experience of the [Native American] practitioner."[22] In Utah, portions of a national park have been closed to visitors to ensure "respect" for "sacred" portions of the park.[23]

Because of the exceptional importance of this matter to westerners, and particularly rural westerners, this Court should grant this Petition.

B. The Decision Of The Tenth Circuit, By Allowing The Federal Government To Deny Access To Federal Lands Based On Religion, Is In True, Direct, Intolerable, And Irreconcilable Conflict With The Controlling Decision Of This Court.

This Court has made it clear that federal land may not be closed to the public for the purposes of religious activity. *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439 (1988). *Lyng* concerned a challenge to the Forest Service's decision to allow timber harvesting and road construction in an area of the Six Rivers National Forest considered sacred by

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[20] Santa Fe Ski Area Master Development Plan. Final Environmental Assessment of November, 1995 at IV – 54.

[21] Historic Preservation Plan for Medicine Wheel National Historic Landmark and Vicinity. United States Forest Service. September 1996, Part III, statement of "Purpose."

[22] Lewis and Clark National Forest Final Environmental Impact Statement, September 1997, Part IV, p.104.

[23] Environmental Assessment for Rainbow Bridge National Monument, January 1990, Page 1.

several Native American tribes. This Court upheld the Forest Service's decision, finding "[t]he First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." *Lyng*, 485 U.S. at 452. This Court held that the Constitution "does not provide a principle that could justify upholding respondents' legal claim." *Id.* at 451, 452.

The *Lyng* decision made clear that the demands for privacy by Native Americans cannot justify the government's closure of public lands, even temporarily: "Nothing in the principle for which [the Native Americans] contend, however, would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands." *Lyng*, 485 U.S. at 452, 453. "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 453. Similarly, in *Bear Lodge* the federal government may not "exclude human activity," in the form of rock climbing, simply because certain Native Americans consider Devils Tower "sacred." Just like the forest land involved in *Lyng*, Devils Tower is public land and the public may not be denied its "right to use" the land. *Id.*

Until its decision in *Bear Lodge*, the Tenth Circuit was in accord with this Court's decision in *Lyng*. In *Badoni v. Higginson*, 638 F.2d 172, 176 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981), the Tenth Circuit held that the public could not be excluded from the Rainbow National Monument even though the Navajo consider the site sacred: "[W]hat plaintiffs seek . . . is affirmative action by the government which implicates the Establishment Clause of the First Amendment." *Badoni*, at 178. "Issuance of regulations to exclude tourists completely from the Monument for the avowed purpose of aiding [Native Americans'] conduct of religious ceremonies would seem a clear violation of the Establishment Clause." *Badoni*, at 179. "The First Amendment . . . gives no one the right to insist that in the pursuit of their own interests others

must conform their conduct to his own religious necessities. . . . " *Id.*

Because the decision of the Tenth Circuit is in direct and intolerable conflict with the clear principles set forth in *Lyng* and *Badoni*, this Court should grant this Petition.

CONCLUSION

For all the above reasons, this Court must grant this Petition.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

BEAR LODGE MULTIPLE USE ASSOCIATION, A Wyoming Non-profit Corporation; ANDY PETEFISH, doing business as Tower Guides; KENNETH D. ALLEN; GARY W. ANDERSON; GREGORY HAUBER; WES BUSH,

Plaintiffs-Appellants,

v.

BRUCE BABBITT, in his official capacity as United States Department of the Interior Secretary; ROGER G. KENNEDY, in his official capacity as Director of the National Park Service; JOHN E. COOK, in his official capacity as Rocky Mountain Regional Director, National Park Service; DEBORAH O. LIGGETT, in her official capacity as Superintendent of Devil's Tower National Monument; NATIONAL PARK SERVICE,

Defendants-Appellees,

CHEYENNE RIVER SIOUX TRIBE; ROMANUS BEAR STOPS; BURDELL BLUE ARM; ARVOL LOOKING HORSE; STEVEN VANCE,

Defendants-Intervenors-Appellees,

No. 98-8021

(Filed Apr. 26, 1999)

GROUP OF CONCERNED SCHOLARS; MEDICINE WHEEL COALITION ON SACRED SITES OF NORTH AMERICA, NORTHERN ARAPAHO TRIBE, SISSETON-WAHPETON SIOUX TRIBE, UPPER SIOUX INDIAN COMMUNITY; NATIONAL CONGRESS OF AMERICAN INDIANS; THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS; THE BECKET FUND FOR RELIGIOUS LIBERTY; BUREAU OF CATHOLIC INDIAN MISSIONS; CLIFTON KIRKPATRICK, AS STATED CLERK OF THE GENERAL ASSEMBLY; THE PRESBYTERIAN CHURCH (U.S.A.); ENRIGHT BIGHORN, AS STATED CLERK OF THE DAKOTA PRESBYTERY IN THE SYNOD OF LAKES & PRAIRIES AND THE PRESBYTERIAN CHURCH (U.S.A.); THE EVANGELICAL LUTHERAN CHURCH IN AMERICA; FRIENDS COMMITTEE ON NATIONAL LEGISLATION; GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS; NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS; PRISON FELLOWSHIP MINISTRIES; UNION OF AMERICAN HEBREW CONGREGATIONS; UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA,

Amici Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING
(D.C. No. 96-CV-063-D)

William Perry Pendley (Todd S. Welch, with him on the briefs), Mountain States Legal Foundation, Denver, Colorado, for Plaintiffs-Appellants.

Jared A. Goldstein, United States Department of Justice, Environmental & Natural Resources Division (Lois J. Schiffer, Assistant Attorney General; John A. Bryson, United States Department of Justice, Environmental & Natural Resources Division, with him on the briefs), Washington, D.C.; for Defendants-Appellees.

Steven J. Gunn, Indian Law Resource Center (Steven C. Emery and Thomas J. Van Norman, Cheyenne River Sioux Tribe, Eagle Butte, South Dakota, with him on the brief), Washington, D.C., for Defendants-Intervenors-Appellees.

Peter G. Griffin, Jacobson, Buffalo, Schoessler & Magnuson, LTD., Minneapolis, Minnesota: Jack F. Trope, Sant'Angelo and Trope, P.C., Cranford, New Jersey: Steven C. Moore and Walter R. Echo-Hawk, Native American Rights Fund, Boulder, Colorado: Kevin J. Hasson and Eric W. Treene, The Becket Fund for Religious Liberty, Washington, D.C., for Amici Curiae.

Before **PORFILIO, McKAY,** and **TACHA,** Circuit Judges.

PORFILIO, Circuit Judge.

Devils Tower is a National Monument, as well as the place of creation and religious practice for many American Indians. Rock climbers use the Tower for recreational and commercial climbing ascents. Over the past 30 years rock climbing on Devils Tower has dramatically increased, affecting the environment and the spiritual life and practices of American Indians. To address the various concerns, the National Park Service (NPS) developed a Final Climbing Management Plan for Devils Tower National Monument (FCMP). In addition to providing educational and environmental programs, the FCMP asks that climbers voluntarily refrain from climbing during the month of June when American Indians engage in the Sun Dance and other ceremonies. The Secretary of the Interior (Secretary) approved the plan. Bear Lodge Municipal Use Association and other climbers (Climbers)[1] challenged the Secretary's approval, arguing the FCMP violates the Establishment Clause. The district court found the FCMP balanced the competing interests and observed the Constitution, and was therefore within Secretarial discretion in managing Devils Tower National Monument. Our jurisdiction arises pursuant to 28 U.S.C. § 1291. We

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[1] Plaintiffs-appellants (Climbers) include: Bear Lodge Multiple Use Association, an organization whose stated objectives are to develop management goals for natural resources and to maintain public access to the sites; Andy Petefish, the owner of a commercial guiding service at Devils Tower; and three long-time recreational climbers of Devils Tower.

believe the Climbers alleged no injury and, therefore, lacked standing to sue.

I.

The Devils Tower National Monument, a 600-foot butte, is located in northeastern Wyoming. The FCMP reports that Devils Tower[2] is a "sacred site" to indigenous peoples of the northern plains who travel to the monument to perform "traditional cultural activities." Devils Tower is also eligible for inclusion to the National Register of Historic Places as a traditional cultural property. In recent years, the Tower has been increasingly used by recreational and commercial rock climbers. Devils Tower, therefore, implicates interests of several American Indian tribes, rock climbers, and the National Park Service.

American Indians at Devils Tower

The Intervenors Cheyenne River Sioux Tribe, et al., and members of numerous other Indian tribes have long viewed Devils Tower as a sacred site of special religious and cultural significance. The NPS explains, "archaeological evidence has revealed that the ancestors to the Lakota people inhabited the Devils Tower area as far back as 1000 A.D., while ancestors to the Shoshone people inhabited the area in the 1500's." The historical use of

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[2] Devils Tower is referred to by many American Indians as "Mato Tipila" which means "Bear Lodge" in Lakota, or "*He Hota Paha*," which means "Grey Horn Butte" in Lakota. It is also called "Bear's Tipi" in Arapahoe, "Bear's House" in Crow, and "Tree Rock" in Kiowa.

Devils Tower and surrounding areas by Lakota people was acknowledged by the Fort Laramie Treaty of 1868. Amici Concerned Scholars state, "Devils Tower is central to [the Indians'] etiological explanation of the universe." The most sacred religious artifact of the Sioux people is the White Buffalo Calf Pipe, given to them by White Buffalo Calf Woman at the beginning of creation when she emerged from Devils Tower. The Tower is prominent in other religiously relevant traditional stories of the Sioux, as well as in the cosmology of numerous other northern plains tribes.

According to Intervenor Romanus Bear Stops, a traditional spiritual leader of the Cheyenne River Sioux Tribe, Devils Tower is also a pilgrimage site where important liturgical functions are performed. At Devils Tower, Indian people[3] partake in Sun Dances and individual Vision Quests. The Sun Dance is a group ceremony of fasting and sacrifice which leads to spiritual renewal of the individual and group as a whole. Sun Dances are performed around the summer solstice. Vision Quests are intense periods of prayer, fasting, sweat lodge purification, and solitude designed to connect with the spiritual world and gain insight. Sun Dances and Vision Quests, as well as individualized prayer offerings and sweat lodge ceremonies, require solemnity and solitude.

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[3] In addition to the Intervenor Cheyenne River Sioux Tribe, the Arapahoe, Crow, Kiowa, Lakota (Sioux), and Wind River (Easter Shoshone) tribes historically occupied the Devils Tower region, dating back before Wyoming was established as a territory or Devils Tower became a National Monument.

The district court did not question the sincerity of the religious practices at Devils Tower. Intervenors explain these traditional religious uses of the Tower are:

> vital to the health of our nation and to our self-determination as a Tribe. Those who use the butte to pray become stronger. They gain sacred knowledge from the spirits that helps us to preserve our Lakota culture and way of life. They become leaders. Without their knowledge and leadership, we cannot continue to determine our destiny.

Amici Concerned Scholars state "as with most cultural groups, traditional religious practice[s] are essential to maintaining a stable and healthy community for Indian people."

Federal Policy on Indian Religious Worship

As the various amici inform us, past federal policy was to assimilate American Indians into United States culture, in part by deliberately suppressing, and even destroying, traditional tribal religions and culture in the 19th and early 20th centuries. The government provided direct and indirect support to Christian missionaries who sought to convert and civilize the Indians, and "from the 1890's to 1930's, the government moved beyond promoting voluntary abandonment of tribal religions to, in some instances, affirmatively prohibiting those religions." Jack F. Trope, *Protecting Native American Religious Freedom: The Legal, Historical, and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act*, 20 N.Y.U.

Rev. L. & Soc. Change 373, 374 (1993).[4] By the late 19th Century federal attempts to replace traditional Indian religions with Christianity grew violent. In 1890 for example, the United States Calvary [sic] shot and killed 300 unarmed Sioux men, women and children en route to an Indian religious ceremony called the Ghost Dance; these included individuals from the Intervenors' tribe. In 1892, Congress outlawed the practice of traditional Indian religious rituals on reservation land. Engaging in the Sun Dance, one of the ceremonies at issue in this case, was punishable by withholding 10 days' rations or 10 days' imprisonment. *See* H. Exec. Doc. No. 1 part 5, vol. II, 53 Cong., 2d Sess., at 28-31, reprinted Francis Paul Prucha, S.J., AMERICANIZATION OF THE AMERICAN INDIAN: WRITINGS FROM THE FRIENDS OF THE INDIANS 1880-1900 (1973), 300-05.[5] This and other laws disrupted and harmed Indian practices, but many, including the Sun Dance and others at issue in this case, survived.

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[4] As early as 1818, the United States contracted with Christian missionary societies to organize and run boarding schools which enrolled Indian students, either voluntarily or by force. *See* Francis E. Leupp, Former Commissioner of Indian Affairs, THE INDIAN AND HIS PROBLEM, 138 (1971 ed., originally printed in 1910). Consistent with President Grant's "Peace Policy," religious orders were given general administrative control of reservations in the 1870's. *See, e.g.*, Annual Report of the Commissioner of Indian Affairs (November 1, 1872) (listing reservation assignments to various religious orders).

[5] *See also*, Dept. of the Interior, Regulations of the Indian Office 106 (1894) (prohibiting the Sun Dance).

Starting in the 1930's federal policy toward Indians changed, and over the past 65 years, has valued and protected tribal governments and cultures. In 1978, Congress enacted the American Indian Religious Freedom Act creating a government-wide policy to protect Indian sacred sites and traditional forms of worship. *See* 42 U.S.C. § 1996 (1994). In 1990, Congress passed the Native American Graves and Repatriation Act (NAGPRA) requiring federal land managers, including the NPS, to protect Indian graves, consult with Indian tribes concerning religious and cultural sites and objects, and to repatriate cultural and religious items found on federal lands. *See* 25 U.S.C. § 3001 (1995). Under the National Historical Preservation Act Amendments of 1992, "properties of traditional religious and cultural importance to an Indian tribe . . . may be determined eligible for inclusion on the National Register" and federal agencies, including the NPS are directed to consult "with any tribe . . . that attaches religious and cultural significance to [such] properties." 16 U.S.C. § 470a(d)(6)(A)-(B) (1985 & 1998 Supp.) The federal government acknowledges that site specific worship is vital to Indian religious practices. Recently the executive branch has ordered federal agencies to: (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid aversely [sic] affecting the physical integrity of such sacred sites. *See* Exec. Order 13007, 61 Fed.Reg. 26771 (1996). Numerous other laws generally protect Indian religion and allow access to and/or temporary

closure of specific tribal sacred sites located on federal lands.[6]

Climbers at Devils Tower

The Climbers explain "climbing on Devils Tower is recognized by the NPS 'as a legitimate recreational and historic activity.' " There is evidence of climbing on the Tower as far back as 1893, and the first "technical climb" occurred in 1937. Climbing at Devils Tower accounted for 1.3% of the annual visitations to the Monument for the years 1989 to 1995, and climbing in the month of June constituted 0.25% of the annual visitation for those same years. According to the Climbers, from 1989 through 1994, June has been the most popular month for climbing Devils Tower. The FCMP reported:

> Recreational climbing at Devils Tower has increased dramatically from 312 climbers in 1973 to over 6,000 annually. New route development in the last ten years resulted [in] accelerated route development and bolt placement. Today the tower has about 220 named routes. Approximately 600 metal bolts are currently

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[6] *See, e.g.*, 16 U.S.C. § 460uu-47 (1993 & 1998 Supp.) (authorizing access to and temporary closures of El Malpais National Monument for traditional cultural and religious purposes); 16 U.S.C. § 410pp-6 (1992 & 1998 Supp.) (authorizing temporary closures of Cibola Historical Park for Indian religious services); 16 U.S.C. § 228i(c) (1992) (preserving access to Grand Canyon National Park for Indian religious purposes); 16 U.S.C. § 41011-4 (1992) (preserving access to federal park lands or archaeological sites for traditional Indian religious purposes); 25 U.S.C. §§ 640d-20 (1995) (providing the Navajo and Hopi tribes with rights to use and access sacred sites).

> embedded in the rock along with several hundred metal pitons. Devils Tower is world famous for its crack climbing, which depends primarily on removable protection placed by climbers in cracks.
>
> Activities performed by the numerous climbers on the tower during the spring through fall climbing season have affected nesting raptors, soil, vegetation, the integrity of the rock, the area's natural quiet, and the rock's physical appearance. Some American Indians have complained that the presence of climbers on the sacred butte and the placement of bolts in the rock has adversely impacted their traditional activities and seriously impaired the spiritual quality of the site.

(FCMP at iii). In addition to placing permanent and temporary metal "protection" in the rock, climbing requires climbers to yell certain commands to their partners. Climbers have also taken pictures of Native Americans in ceremonies, removed sacred prayer bundles, and intruded on solitude.

The Climbers acknowledge that "privacy is considered essential . . . for many of the religious practices of some American Indians, including Vision Quests, the leaving of prayer offerings, sweatlodge rites, [and] the Sun Dance." However, their brief describes:

> In a survey performed in June and July of 1992 by a group independent of the NPS, climbers were asked specifically if their "views of climbing would change if they knew that Native Americans considered it a sacred site and objected to climbing." Sixty-seven (67) percent said their view of climbing would not change out of

> respect for the religious beliefs of some Native Americans and "that they would continue to climb the tower."

The Climbers also contend "climber-watching" is a favorite activity of numerous visitors to Devils Tower. All of the individual named plaintiffs in this case continue to climb at Devils Tower.

National Park Service Plan

In 1906, President Roosevelt established Devils Tower and the 1300-acre area surrounding it as the first national monument. ***See*** Presidential Proclamation No. 658, 34 Stat. 3236 (Sept. 24, 1906). Since 1916, Devils Tower has been under the management of the National Park Service, an agency of the Department of the Interior. Under its governing statute, NPS must protect the values for which Devils Tower National Monument was established. ***See*** 16 U.S.C. 1a-1 (1988).[7] In its appellate brief, NPS explains one of the primary bases for the Tower's designation as a National Monument is the prominent role it has played in the cultures of several American Indian tribes of the North Plains.

Recognizing that increasing climbing activity[8] affects the environment as well as "the ability of American

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[7] President Roosevelt declared the Tower is "a natural wonder and an object of historic and great scientific interest . . . [and] warning is hereby given to all unauthorized persons not to appropriate, injure, or destroy any feature of the natural tower." Presidential Proclamation No. 458, 34 Stat. 3236, 3237 (Sept. 24, 1906).

[8] In 1994, the NPS counted 6,035 climbers on Devils Tower. NPS indicated the total recreational users of Devils Tower

Indians to engage in their ceremonial activities in peace," NPS began preparing a draft climbing management plan in 1992. Its objectives were to "manag[e] climbing so as to preserve and protect the monument's natural and cultural resources, and to increase visitor awareness of American Indian beliefs and traditional practices at Devils Tower." With the assistance of environmentalists, county officials, climbers, and representatives of American Indian communities, NPS issued a draft climbing management plan in July 1994, and made available 1200 copies to interested parties. A public comment period lasted until the end of October 1994, during which NPS received nearly 300 written comments, and also recorded oral comments at six public meetings held around the region. The NPS issued the "Final Climbing Management Plan/Finding of No Significant Impact for Devils Tower National Monument" in February 1995. The FCMP "sets a new direction for managing climbing activity at the Tower for the next three to five years." FCMP at i. Its purpose is "to protect the natural and cultural resources of Devils Tower and to provide for visitor enjoyment and appreciation of this unique feature." *Id.* To protect against any new physical impacts to the Tower, the FCMP provides that no new bolts or fixed pitons will be permitted on the Tower, and new face routes requiring new bolt installation will not be permitted. *Id.* at 24-25. The FCMP does allow individuals to replace already existing bolts and fixed pitons. *Id.* at 25. In addition, the plan calls for access trails to be rehabilitated and maintained, and

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number nearly half a million per year, of which climbers constitute 1.3%.

requires camouflaged climbing equipment, and climbing routes to be closed seasonally to protect raptor nests. *Id.* at 24-29. The FCMP further provides that "[i]n respect for the reverence many American Indians hold for Devils Tower as a sacred site, rock climbers will be asked to voluntarily refrain from climbing on Devils Tower during the culturally significant month of June." *Id.* at i.

The NPS represents it will rely on climbers' self-regulation and a new educational program "to motivate climbers and other park visitors to comply" with the FCMP. *Id.* at 22. The NPS has also placed a sign encouraging visitors to stay on the trail surrounding the Tower.[9] The FCMP provides for evaluation of the plan after three to five years. Factors indicating an unsuccessful voluntary closure would include little to no decrease in the number of climbers, an increase in the number of unregistered climbers, and increased conflict between user groups in the park. *Id.* at 23. The voluntary closure will be "fully successful when every climber personally chooses not to climb at Devils Tower during June out of respect for American Indian cultural values." *Id.* However, the FCMP recognizes, "the value of a voluntary closure is that individuals can make a personal choice about climbing. Climbers can regulate themselves by deciding if they want to refrain from June climbing out of respect for American Indian cultural values." *Id.* at 22.

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[9] The sign is posted by the NPS at the base of the Tower and reads, "The Tower is sacred to American Indians. Please stay on the trail."

If NPS determines that voluntary June closure and the educational programs have not been successful, it will consider several actions, including, but not limited to:

> (a) revise the climbing management plan; (b) reconvene a climbing management plan work group; (c) institute additional measures to further encourage compliance; (d) change the duration and nature of the voluntary closure; (e) convert the June closure to mandatory; (f) write a new definition of success for the voluntary closure.

Id. at 23.

The NPS plans to comply with its June closure by not allowing NPS staff to climb on the Tower in June except to enforce laws and regulations or to perform emergency operations. Originally, the plan also contained a provision stating that commercial use licenses for climbing guide activities would not be issued by the NPS for the month of June. *Id.* at 22. The Climbers filed a motion to enjoin NPS from imposing the ban on commercial climbing during the month of June. The district court granted the motion in June 1996. In December of that year, the Secretary issued a decision revoking the commercial climbing ban.

Although the FCMP no longer calls for a ban on commercial climbing in the month June, the Climbers argue that the Secretary wrongfully contends he has the power to impose such a rule. Other provisions objected to by the Climbers remain in the plan. These include the voluntary ban on climbing in June; an interpretive education program which explains the religious and cultural

significance that the Monument has among some American Indians; and finally, the placement of signs which encourage people to remain on the trail surrounding the Tower.

II.

Before the district court, the Climbers challenged the Secretary's approval of the FCMP, arguing the FCMP violated the Establishment Clause. The district court decided on the merits that the Secretary's approval of the NPS plan was "a lawful and legitimate exercise of [his] authority . . . carefully crafted to balance the competing needs of individuals using Devil's Tower . . . while . . . obeying the edicts of the Constitution."[10] On appeal, the Climbers again raise their Establishment Clause claim, and the Secretary responds the Climbers lack standing to sue. The Secretary points out:

> FCMP has not caused any injury to Bear Lodge or its members because they remain free to climb Devils Tower any time they choose, including during June. . . . Indeed, while many climbers have chosen not to climb during the month of June out of respect for American Indian use of the site, appellants Andy Petefish, Gary Anderson, Kenneth Allen, Gregory

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[10] We are not, as the Climbers erroneously argue, reviewing a grant of summary judgment in favor of the Secretary. If the standing issue did not preclude us from doing so, we would review *de novo* the district court's decision the Secretary acted within his discretion in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. *See Public Lands Council v. Babbitt*, 154 F.3d 1160, 1166 (10th Cir. 1998).

> Hauber, and Wes Bush have continued to climb in June.

Nonetheless, the Climbers contend even if *they* have climbed, other members of the Bear Lodge Multiple Use Association have been "coerced by the ban into refraining from climbing. Thus even if the named plaintiffs were found to lack standing, other Association members suffer the injury in fact necessary to confer standing on the association itself."[11]

The United States Supreme Court articulated the standing requirements in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130 (1992). In that case, several environmental organizations dedicated to wildlife conservation and other environmental causes, sought to challenge the Secretary of the Interior's reinterpretation of section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536. The Court outlined the three essential elements necessary to establish standing:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not

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[11] Apparently, the Climbers have abandoned their argument, totally rejected by the district court, that the interpretive program and sign injured school children visiting the Monument, thereby conferring standing on the Climbers.

> before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61 (internal quotations and citations omitted). The party invoking federal jurisdiction bears the burden of establishing these elements and of coming forward with evidence of specific facts which prove standing. *Id.* at 561.

Establishing injury in fact requires "a factual showing of perceptible harm." *Id.* at 566 (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688, 93 S. Ct. 2405, 2416 (1973)); ***see also*** *Department of Commerce v. United States House of Representatives*, ___ U.S. ___, 119 S. Ct. 765, 766-67 (1999) (To establish standing, a plaintiff must allege personal injury which is fairly traceable to defendants' allegedly unlawful conduct, and which is likely to be redressed by the requested relief.). We have held, "to satisfy Article III's case or controversy requirement, a litigant in federal court is required to establish its *own* injury in fact." *National Council for Improved Health v. Shalala*, 122 F.3d 878, 882 (10th Cir. 1997) (emphasis added). Although a given action may cause harm to third persons, "a litigant may invoke only its own constitutional rights and may not assert rights of others not before the court." *Id.*

The named individual recreational climbers whose climbing activities have been undeterred by the FCMP have established no injury in fact and therefore do not have standing. Further, the district court found commercial climbing guide Andy Petefish did not substantiate his claim of economic injury as a result of the voluntary closure, and he has provided no additional substantiation

here. Even if other Bear Lodge members have elected not to climb in June, that decision is one of several choices available under the plan and is not an injury conferring standing. As the district court held, the possibility of mandatory closure is a "remote and speculative possibility," and is just one of many possibilities FCMP will consider if the present plan proves unsuccessful. The Climbers' fear of an outright climbing ban in June does not satisfy the constitutional requirement for an injury in fact, which must be "actual or imminent not conjectural or hypothetical." *Bennett v. Spear*, ___ U.S. ___, 117 S. Ct. 1154, 1163 (1997).

In short, the Climbers "claim that the Constitution has been violated, [but] they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485, 102 S. Ct. 752, 765 (1982). The Climbers are clearly incensed by the NPS' request that they voluntarily limit their climbing, but

> standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy. That concrete adverseness which sharpens the presentation of issues, is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself.

Id. at 486, 102 S. Ct. at 766 (internal quotations and citations omitted). Because they have alleged no injury as a result of their claim the FCMP improperly establishes religion, we hold the Climbers have no standing to sue in this case.

III.

We believe the Climbers' lack of standing is dispositive. Therefore, we do not reach either the Climbers' argument the FCMP establishes religion or the Secretary's response that the plan was designed, in part, to eliminate barriers to American Indians' free practice of religion and such accommodation is appropriate in situations like this where the impediments arise because the sacred place of worship is found on property of the United States.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BEAR LODGE MULTIPLE USE ASSOCIATION, a Wyoming nonprofit corporation; ANDY PETEFISH; doing business as Tower Guides; GARY NMN ANDERSON; KENNETH D. ALLEN; GREGORY HAUBER; WES BUSH,	)	No. 96-8055
Plaintiffs-Appellees,	)	(Filed Jun. 18, 1996)
v.	)	
BRUCE BABBITT, Secretary, United States Department of the Interior; et al,	)	
Defendants-Appellants.	)	

ORDER

Before PORFILIO and MURPHY, Circuit Judges.

Appellants have filed a motion for stay pending appeal of the district court's order preliminarily enjoining them from restricting commercial use licenses for June climbing guide activities solely out of respect for American Indian religious/cultural values.

To be entitled to a stay pending appeal, an appellant must show (1) a likelihood of success on appeal; (2) a threat of irreparable harm if the stay is not granted; (3)

absence of harm to the opposing party; and (4) public interests not adverse to a stay or injunction. *See* 10th Cir. R. 8.1; *Autoskill Inc. v. National Educ. Support Sys., Inc.*, 994 F.2d 1476, 1487 (10th Cir.), *cert. denied*, 114 S. Ct. 307 (1993). On consideration of appellants' motion, the court concludes that appellants have failed to show irreparable harm if the stay is not granted.

Accordingly, the motion for stay is denied.

Entered for the Court
PATRICK FISHER, Clerk

By /s/ Elisabeth A Illegible
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BEAR LODGE MULTIPLE USE ASSOCIATION, a Wyoming non-profit corporation; ANDY PETEFISH, doing business as Tower Guides; GARY ANDERSON; KENNETH D. ALLEN; GREGORY HAUBER; WES BUSH,	)	No. 96-8055
Plaintiffs – Appellees,	)	
v.	)	
BRUCE BABBITT, Secretary, United States Department of the Interior; ROGER KENNEDY, Director of the National Park Service; JOHN E. COOK, Rocky Mountain Regional Director for the National Park Service; DEBORAH O. LIGGETT, Superintendent of Devil's Tower National Monument; NATIONAL PARK SERVICE,	)	
Defendants – Appellants,	)	
CHEYENNE RIVER SIOUX TRIBE, ROMANUS BEAR STOPS, BURDELL BLUE ARM, ARVOL LOOKING HORSE, STEVEN VANCE,	)	
Intervenor – Defendants.	)	

ORDER

Entered June 28, 1996

Appellant's motion to dismiss the captioned appeal is granted, 10th Cir. R. 27.3 (i). A certified copy of this order shall stand as and for the mandate of this court.

Entered for the Court
PATRICK FISHER, Clerk

By /s/ L. Illegible
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

BEAR LODGE MULTIPLE USE ASSOCIATION, et al., Plaintiffs,	)	96-CV-063-D
vs.	)	
BRUCE BABBITT, Secretary of the Interior, et al., Defendants.	)	

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

(Filed June 8, 1996)

This matter having come before the Court on Plaintiffs' Motion for Preliminary Injunction and the Court, having carefully considered the briefs and materials submitted in support of the motion and Defendants' opposition thereto, having heard oral testimony and argument from the parties and being otherwise fully advised in the premises, FINDS and ORDERS as follows:

BACKGROUND

A Final Climbing Management Plan ("FCMP") / Finding of No Significant Impact for Devils Tower National Monument[1] was issued by the United States

[1] The Devils Tower National Monument is located in northeast Wyoming. The FCMP reports that the Tower is a "sacred site" to several American Indian peoples of the northern plains who are increasingly travelling to the monument to

Department of the Interior, National Park Service ("NPS") in February of 1995. The FCMP "sets a new direction for managing climbing activity at the tower for the next three to five years," its stated purpose being "to protect the natural and cultural resources of Devils Tower and to provide for visitor enjoyment and appreciation of this unique feature." (FCMP at i.) To protect against any new physical impacts to the tower, the FCMP provides that no new bolts or fixed pitons will be permitted on the tower, new face routes requiring new bolt installation will not be permitted, access trails will be rehabilitated and

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perform "traditional cultural activities." Devils Tower is also eligible for inclusion to the national Register of Historic Places as a traditional cultural property. The FCMP further reports:

> Recreational climbing at Devils Tower has increased dramatically from 312 climbers in 1973 to over 6,000 annually. New route development in the last ten years resulted [in] accelerated route development and bolt placement. Today the tower has about 220 named routes. Approximately 600 metal bolts are currently embedded in the rock along with several hundred metal pitons. Devils Tower is world famous for its crack climbing, which depends primarily on removable protection placed by climbers in cracks.
>
> Activities performed by the numerous climbers on the tower during the spring through fall climbing season have affected nesting raptors, soil, vegetation, the integrity of the rock, the area's natural quiet, and the rock's physical appearance. Some American Indians have complained that the presence of climbers on the sacred butte and the placement of bolts in the rock has adversely impacted their traditional activities and seriously impaired the spiritual quality of the site.

(FCMP at ii-iii.)

maintained, camouflaged climbing equipment is required, and climbing routes will be closed seasonally to protect raptor nests. *Id.* at 24-29. The FCMP further provides that "[i]n respect for the reverence many American Indians hold for Devils Tower as a *sacred* site, rock climbers will be asked to *voluntarily* refrain from climbing on Devils Tower during the culturally significant month of June." *Id.* at i (emphasis added). The FCMP does not identify any other reason for the June "voluntary closure."[2]

The NPS represents that it will not enforce the voluntary closure, but will instead rely on climbers' self-regulation and a new "cross-cultural educational program" "to motivate climbers and other park visitors to comply." *Id.* at 22. However, the FCMP also provides that if the voluntary closure proves to be "unsuccessful,"[3] the NPS will

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[2] As pointed out in the Cheyenne River Sioux Tribe amicus parties' brief, the FCMP describes Elie June closure to commercially guided climbing as a compromise:

> The reasons for the June closure are not tied directly to religious ceremonies at Devils Tower, however, the summer solstice, which occurs in June, is a very culturally significant time to American Indians. The 30-day June period was selected as a compromise in the modem world.

The Court finds that this statement attempts to mask the true purpose of the ban on commercial guiding during the month of June. Further, the Court is not persuaded that a legitimate distinction can be drawn in this case between the "religious" and "cultural" practices of those American Indians who consider Devils Tower a sacred site.

[3] The NPS will consider the voluntary closure "fully successful" "when every climber personally chooses not to

consider taking several actions including: (a) revising the climbing management plan: (b) reconvening a climbing management plan work group; (c) instituting additional measures to further encourage compliance; (d) change the duration and nature of the voluntary closure, (e) *converting the June closure to mandatory;* and (f) writing a new definition of success for the voluntary closure. *Id.* at 23. The NPS plans to fully comply with its own June closure in the following manner: (a) NPS staff will not climb on the tower in June except to enforce laws and regulations or to perform emergency operations; and (b) *commercial use licenses for June climbing guide activities will not be issued by the NPS for the month of June. Id.* at 22.

Plaintiffs[4] filed the instant action on March 13, 1996, alleging that the June closure is unconstitutional as a

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climb at Devils Tower during June *out of respect for American Indian cultural values."* (FCMP at 23) (emphasis-added).

[4] Plaintiff Bear Lodge Multiple Use Association ("BLMUA") is a voluntary, nonprofit corporation based in Hulett, Wyoming (near Devils Tower National Monument) whose goal is to develop management objectives for natural resources that maintain economic stability, public access and environmental sustainability and/or health, in and around local communities. (Compl. ¶ 1.) Plaintiff Andy Petefish, a member of BLMUA, is a resident of Wyoming, and is doing business as Tower Guides, a commercial guiding service that provides professional guides to assist persons in climbing Devils Tower. *Id.* ¶ 2. Plaintiff Gary Anderson, a member of BLMUA, is a citizen of Wyoming and has been climbing on Devils Tower for 12 years, including the month of June for each of those 12 years. *Id.* ¶ 3. Plaintiff Kenneth D. Allen, a member of BLMUA, is a resident of Hulett, Wyoming, and has been climbing on Devils Tower for more than 4 years, including the month of June for each of those 4 years. *Id.* ¶ 4. Plaintiff Gregory Hauber, a member of BLMUA, is a resident of Hulett, Wyoming, and has

violation of the First Amendment's Establishment Clause and requesting the Court to permanently enjoin Defendants from implementing the FCMP and the June climbing restriction.[5] Plaintiffs subsequently filed a Motion for Preliminary Injunction based on their contention that the June closure provision of the FCMP violates the Establishment Clause in that the express, and only, purpose for the restriction of climbing during the month of June is to endorse and promote the religious views of some American Indians. Plaintiffs' motion asks the Court to enjoin the Defendants from implementing the FCMP until it has the opportunity to fully address the merits of this case and, specifically, to enjoin Defendants from restricting commercial use licenses for guided climbing activities during the month of June.

Standard of Review

"The function of a preliminary injunction is to preserve the status quo pending a final determination of the rights of the parties." *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980). As held by the Tenth Circuit, "[tlhe status quo is not defined by the parties existing *legal rights;* it is

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been climbing on Devils Tower for over a year, including the month of June. *Id.* ¶ 5. Plaintiff Wes Bush, a member of BLMUA, is a resident of Hulett, Wyoming, and has been climbing on Devils Tower for almost 2 years, including the month of June. *Id.* ¶ 6.

[5] Plaintiffs also alleged claims for violation of NPS policies, violation of the equal protection component of the Due Process Clause of the Fifth Amendment, and violation of Plaintiffs' civil rights. However, these claims were not addressed by the parties for purposes of the preliminary injunction motion.

defined by the *reality* of the existing status and relationships between the parties, regardless of whether the existing status and relationships may ultimately be found to be in accord or not in accord with the parties' legal rights." *SCFC ILC, Inc. v. VISA USA, Inc.*, 936 F.2d 1096, 1100 (10th Cir. 1991) (emphasis in original).

In defining what a movant must show to support the grant of a preliminary injunction, the Tenth Circuit Court of Appeals has said:

> In hearings upon motions for temporary or preliminary injunctive relief, the burden is upon the one requesting such relief to make a prima facie case showing a reasonable probability that he will ultimately be entitled to the relief sought. The applicant has the additional burden of showing a right to the specific injunctive relief sought because of irreparable injury that will result if the injunction is not granted. There must exist a probable right and a probable danger.

Lundgrin, 619 F.2d at 63 (quoting *Crowther v. Seaborg*, 415 F.2d 437, 439 (10th Cir. 1969)). The Tenth Circuit has further defined the prerequisites which the party seeking a preliminary injunction must demonstrate:

> (1) substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest.

Longstreth v. Maynard, 961 F.2d 895, 902 (10th Cir. 1992) (citing *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980)). Thus, as the movants, Plaintiffs bear the burden of proof on each of these four elements.

The Tenth Circuit has also recognized that "[a]s a preliminary injunction is an extraordinary remedy, . . . the right to relief must be clear and unequivocal." *SCFC ILC, INC.*, 936 F.2d at 1098 (citations omitted). "Because it constitutes drastic relief to be provided with caution, a preliminary injunction should be granted only in cases where the necessity for it is clearly established." *United States v. Enterprise Management Consultants, Inc.*, 883 F.2d 886, 888-89 (10th Cir. 1989).

Discussion

I. Likelihood of Success on the Merits

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court set forth three tests to consider when determining whether a governmental action is violative of the Establishment Clause.[6] "First, the [action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [action] must not foster 'an excessive government entanglement with religion.' " *Id.* at 612-13 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)) (citations omitted).

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[6] The Establishment Clause contained in the First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, ... "

However, the Supreme Court has "long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987).

Plaintiffs' contend that the NPS June closure to climbing restricts a legitimate and long-recognized public use of Devils Tower to endorse and promote the religious views of some Native Americans and goes well beyond an "accommodation" of religious practices.

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government *may not coerce* anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."

Lee v. Weisman, 505 U.S. 577, 587, 112 S.Ct. 2649, 2655, 120 L.Ed.2d 467 (1992) (emphasis added) (bracketed word in original). Defendants contend that this case is distinguishable from other First Amendment cases because the Supreme Court has encouraged the accommodation of Indian religious practices on federal lands. In support of this contention, Defendants rely on, *inter alia*, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988):

> Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to the use of its own land, for example,

> need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents.

Id. at 453-54. Defendants assert that this legitimate governmental interest is also embodied in the American Indian Religious Freedom Act, 42 U.S.C. § 1996, in which Congress stated:

> [I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut. and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

Defendants assert that the exercise of religion by American Indians is burdened by the distracting, and, to the Indians, offensive presence of large numbers of climbers on the tower during traditional cultural and spiritual activities like sun dances, vision quests, ritual sweats, and individual meditation, and that the government's removal of a burden on the free exercise of religion is a permissible accommodation.

In *Lyng*, the respondents emphasized the limits of the religious restrictions that they were seeking to impose on the Chimney Rock area of the Six Rivers National Forest. "While defending an injunction against logging operations and the construction of a road, they apparently [did] not at [that time] object to the area's being used by recreational visitors, other Indians, or forest rangers."

Lyng, 485 U.S. at 452. In addressing this point, the Supreme Court stated:

> Nothing in the principle for which they contend, however, would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might *seek to exclude all human activity but their own from sacred areas of the public lands.* The Indian respondents insist that "[p]rivacy during the power quests is required for the practitioners to maintain the purity needed for a successful journey." . . . Similarly: "The practices conducted in the high country entail intense meditation and require the practitioner to achieve a profound awareness of the natural environment. Prayer seats are oriented so there is an unobstructed view, and the practitioner must be surrounded by undisturbed naturalness." . . . No disrespect for these practices is implied when one notes that such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property. Even without anticipating future cases, the diminution of the Government's property rights. and the concomitant subsidy of the Indian religion, would in this case be far from trivial[.]

Id. at 452-53 (emphasis added).

In a similar light, the Tenth Circuit Court of Appeals has stated:

> Issuance of regulations to exclude tourists completely from the [Rainbow Bridge National Monument] for the avowed purpose of aiding [Indian] plaintiffs' conduct of religious ceremonies would seem a clear violation of the Establishment Clause.

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

School Dist. of Abington v. Schempp, 374 U.S. at 222, 83 S.Ct. at 1571. *Exercise of First Amendment freedoms may not be asserted to deprive the public of its normal use of an area. Shuttlesworth v. Birmingham*, 394 U.S. 147, 152, 89 S.Ct. 935, 939, 22 L.Ed.2d 162 (1969); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 320, 88 S.Ct. 1601, 1609, 20 L.Ed.2d 603 (1968); *Cox v. Louisiana*, 379 U.S. 536, 554-55, 85 S.Ct. 453, 464, 13 L.Ed.2d 471 (1965); *Niemotko v. Maryland*, 340 U.S. 268, 271, 71 S.Ct. 325, 327, 95 L.Ed. 267 (1951).

Badoni v. Higginson, 638 F.2d 172, 179 (10th Cir. 1980) (emphasis added). In denying relief insofar as the plaintiffs in *Badoni* sought to have the government police the actions of tourists lawfully visiting the Monument, the Tenth Circuit court determined that, although the Park Service was authorized to regulate the conduct of visitors in order to promote and preserve the Monument, the plaintiffs did not have a constitutional right to have visitors act "in a respectful and appreciative manner." *Id.* at 179 (quoting Appellants' Reply Br. at 4).

> The First Amendment protects one against action by the government, though even then,

> not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life.

Id. (quoting *Otten v. Baltimore & O. R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)). "Were it otherwise, the Monument would become a government-managed religious shrine." *Badoni*, 638 F.2d at 179.

Defendants attempt to dismiss the applicability of the *Badoni* case by asserting that there was no Establishment Clause claim at issue in *Badoni* which involved a request *compelling* government action to exclude others from the Monument, at least for short periods, and to control tourist behavior. Factually, however, the *Badoni* case is the most applicable of all the cases cited herein and relied on by the parties in that the government (NPS) action requested by the plaintiffs in *Badoni* is essentially the same type of action taken by the NPS in this case. In *Badoni*, the court found that it was the presence of tourists at the Monument and their actions while there that gave rise to the plaintiffs' complaint of interference with the free exercise of their religion. In the case at bar, the NPS has promulgated a plan to prohibit the presence of climbers (at least guided climbing activities) on Devils Tower National Monument to eliminate such interference with the free exercise of some American Indians' religious/cultural practices. "We are mindful of the difficulties facing plaintiffs in performing solemn religious ceremonies in an area frequented by tourists. But what

plaintiffs seek in the name of the Free Exercise Clause is *affirmative action by the government which implicates the Establishment Clause* of the First Amendment."[7] *Id.* at 178 (emphasis added). Likewise, this Court is mindful of the similar difficulties facing some American Indians who hold Devils Tower as a sacred site and certainly does not question the sincerity of their concerns. Nevertheless, affirmative action by the NPS to exclude a legitimate public use of the tower for the sole purpose of aiding or advancing some American Indians' religious practices violates the First Amendment's Establishment Clause.

In light of the guidance provided by the foregoing case law, the FCMP seems to violate the Establishment Clause to the extent that it prohibits the issuance of commercial use licenses for guided climbing activities during the month of June and to the extent that it "coerces" the support of some American Indians' religious practices by threatening mandatory closure to all climbing during the month of June. Such regulations require climbers to conform their conduct in furtherance of those American Indians' religious necessities. This amounts to impermissible governmental entanglement with religion. Therefore, there is a substantial likelihood that Plaintiffs will eventually prevail on the merits of their Establishment Clause claim.

The Court does not have the same concerns with a straight "voluntary closure" to climbing, however. The

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[7] After making this determination, the *Badoni* court went on to analyze the requested governmental action under essentially the same factors that make up the *Lemon* test for determining whether a government action violates the Establishment Clause.

simple request that climbers refrain from climbing during the month of June out of respect for American Indian religious and cultural values seems to be a permissible accommodation of American Indian religious practices in light of the government's legitimate interest in protecting and preserving for American Indians their inherent right to exercise the traditional religions, including their access and use of sacred sites. The Court finds that such a request attempts to alleviate a special burden on a particular religion without fostering an excessive governmental entanglement with religion.

II. Irreparable Injury

"After examining a plaintiffs likelihood of success on the merits of their claims, a court must balance those conclusions and findings with other factors, including the possibility that denial of a preliminary injunction will cause irreparable harm to the plaintiff." *Dayton Area Visually Impaired Persons, Inc. v. Fisher,* 70 F.3d 1474, 1489 (6th Cir. 1995). The Supreme Court has recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). *See also Parents' Assn of P.S. 16 v. Quinones,* 803 F.2d 1235, 1242 (2d Cir. 1986); *Ingebretsen v. Jackson Public Sch. Dist.,* ___ F.3d ___, 1996 WL 205, 4 (5th Cir. 1996); *Local Organizing Committee, Million Man March v. Cook,* ___ F.Supp. ___, 1996 WL 189291, 8 (D. Col. 1996); *Central Ave. Enterprises, Inc. v. City of Las Cruces,* 845 F.Supp. 1499, 1503 (D.N.M. 1994). Having determined that the Plaintiffs in this case have established a substantial likelihood of success on the

merits of their claim under the First Amendment's Establishment Clause, they have also established the possibility of irreparable harm as a result of the loss of this First Amendment right.[8] *See Fisher, supra* at 1490.

The Court is not persuaded by Defendants' attempt to distinguish *Elrod* on the basis that it involved a claim under the First Amendment's Free Exercise Clause rather than the Establishment Clause. If a plaintiff can show that the governmental action complained of is a violation of the Establishment Clause, he has demonstrated irreparable injury. *See Parents' Ass'n of P.S. 16,* 803 F.2d at 1242 (Plaintiffs entitled to a preliminary injunction since the violation of their rights under the Establishment Clause constitutes irreparable injury); *Randall v. Pegan,* 765 F.Supp. 793, 795 (W.D.N.Y. 1991) ("[I]f the plaintiffs can show that the baccalaureate service is a violation of the Establishment Clause, they will have demonstrated both an irreparable injury as well as a likelihood of success on the merits."); *Albright v. Board of Education,* 765 F.Supp. 682, 687 (D. Utah 1991) (In analyzing irreparable injury requirement as to claim under the Establishment Clause, court found that such injury is "presumed to exist whenever First Amendment constitutional rights are

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[8] Plaintiffs' contention that Andy Petefish, d/b/a Tower Guides, will suffer irreparable financial injury is plainly without merit. Mr. Petefish's Declaration amply demonstrates that his financial losses suffered in June, 1995, when the ban was still totally voluntary, were minuscule. His assertion of anticipated substantial losses for June, 1996 operations are assumptions unsupported by any credible evidence.

infringed."); *Jaffree v. James*, 544 F.Supp. 727, 730 (impairment of First Amendment freedoms in violation of Establishment Clause constitutes irreparable injury).

III. Balance of Harms / Public Interest

Since Plaintiffs' fundamental First Amendment rights are at issue, it is clear that their threatened injury outweighs any injury a preliminary injunction may cause Defendants. *See Million Man March, supra* at 8. Finally, "[v]indication of constitutional freedoms and protection of First Amendment rights is in the public interest." *Albright*, 765 F.Supp. at 686-87. *See also Million Man March, supra*, at 8.

CONCLUSION

The Defendants' efforts to fashion a voluntary program whereby climbers are encouraged to show respect for American Indian religious and cultural traditions is both laudable and constitutionally permissible. The Defendants' solicitous concerns for Indian religion and efforts to provide reasonably unfettered access to Indian sacred sites is also in keeping with the American Indian Religious Freedoms Act ("AIRFA"), 42 U.S.C. § 1996. Yet it must be remembered that the purpose of this act is to ensure that American Indians are afforded the protections guaranteed by the First Amendment's Free Exercise Clause and was not intended to grant rights to Indians in excess of those guarantees. *Attakai v. U.S.*, 746 F.Supp. 1395, 1405 (D. Ariz. 1990).

In light of the Court's findings herein, it is expected that, absent the existence of an objective reason for denying Plaintiff Petefish's application for a commercial use license for June climbing guide activities, said application will be granted.

THEREFORE, it is

ORDERED that Plaintiffs' Motion for Preliminary Injunction is hereby GRANTED to the extent that Defendants' are enjoined from restricting commercial use licenses for June climbing guide activities solely out of respect for American Indian religious/cultural values; it is further

ORDERED that Plaintiffs' Motion for Preliminary Injunction is hereby DENIED to the extent Plaintiffs seek to enjoin the implementation of other aspects of the FCMP.

DATED this 8th day of June, 1996.

/s/ William J. Illegible
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

BEAR LODGE MULTIPLE USE ASSOCIATION, et al.,	)	
Plaintiffs,	)	No. 96-CV-063-D
vs.	)	
BRUCE BABBITT, Secretary of the Interior, et al.,	)	
Defendant.	)	

Order

(Filed Apr 2 1998)

The above-captioned matter comes before the Court on Plaintiffs' appeal of Defendants' Final Climbing Management Plan for Devil's Tower National Monument. The Court, having carefully considered the briefs and materials submitted in support of the motion and Defendants' opposition thereto, having heard oral argument from the parties and being otherwise fully advised in the premises, FINDS and ORDERS as follows:

BACKGROUND

The United States Department of the Interior, National Park Service ("NPS") issued A Final Climbing Management Plan ("FCMP") / Finding of No Significant Impact for Devils Tower National Monument[1] in

[1] The Devils Tower National Monument is located in northeast Wyoming. The FCMP reports that the Tower is a "sacred site" to several American Indian peoples of the northern

February of 1995. The FCMP "sets a new direction for managing climbing activity at the tower for the next three to five years", its stated purpose being, "to protect the natural and cultural resources of Devils Tower and to provide for visitor enjoyment and appreciation of this unique feature." (FCMP at i.) To protect against any new physical impacts to the tower, the FCMP provides that no new bolts or fixed pitons will be permitted on the tower, and new face routes requiring new bolt installation will not be permitted. *Id.* at 24-25. The FCMP does allow

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plains who are increasingly traveling to the monument to perform "traditional cultural activities." Devils Tower is also eligible for inclusion to the national Register of Historic Places as a traditional cultural property. The FCMP further reports:

> Recreational climbing at Devils Tower has increased dramatically from 312 climbers in 1973 to over 6,000 annually. New route development in the last ten years resulted [in] accelerated route development and bolt placement. Today the tower has about 220 named routes. Approximately 600 metal bolts are currently embedded in the rock along with several hundred metal pitons. Devils Tower is world famous for its crack climbing, which depends primarily on removable protection placed by climbers in cracks.
>
> Activities performed by the numerous climbers on the tower during the spring through fall climbing season have affected nesting raptors, soil, vegetation, the integrity of the rock, the area's natural quiet, and the rock's physical appearance. Some American Indians have complained that the presence of climbers on the sacred butte and the placement of bolts in the rock has adversely impacted their traditional activities and seriously impaired the spiritual quality of the site.

(FCMP at ii-iii.)

individuals to replace already existing bolts and fixed pitons. *Id.* at 25. In addition, the plan calls for access trails to be rehabilitated and maintained, and requires camouflaged climbing equipment, and climbing routes to be closed seasonally to protect raptor nests. *Id.* at 24-29. The FCMP further provides that "[i]n respect for the reverence many American Indians hold for Devils Tower as a *sacred* site, rock climbers will be asked to *voluntarily* refrain from climbing on Devils Tower during the culturally significant month of June." *Id.* at i (emphasis added). The FCMP does not identify any other reason for the June "voluntary closure."[2]

The NPS represents that it will not enforce the voluntary closure, but will instead rely on climbers' self-regulation and a new "cross-cultural educational program" "to motivate climbers and other park visitors to comply." *Id.* at 22. The NPS has also placed a sign at the base of the Tower in order to encourage visitors to stay on the trail surrounding the Tower. Despite the FCMP's reliance on self-regulation, it also provides that if the voluntary closure proves to be "unsuccessful," the NPS will consider taking several actions including: (a) revising the climbing management plan; (b) reconvening a climbing management plan work group; (c) instituting additional measures to further encourage compliance; (d) change the

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[2] The Defendants attempt to characterize these measures as relating solely to American Indian culture and being wholly separate from any religious practices. The Court is not persuaded that a legitimate distinction can be drawn in this case between the "religious" and "cultural" practices of those American Indians who consider Devils Tower a sacred site.

duration and nature of the voluntary closure; (e) *converting the June closure to mandatory;* and (f) writing a new definition of success for the voluntary closure. *Id.* at 23 (emphasis added). Factors indicating an unsuccessful voluntary closure include, little to no decrease in the number of climbers, an increase in the number of unregistered climbers and increased conflict between user groups in the park. *Id.* The NPS, however, states that the voluntary closure will be "fully successful" only "when every climber personally chooses not to climb at Devils Tower during June out of respect for American Indian cultural values." *Id.*

The NPS plans to fully comply with its own June closure by not allowing NPS staff to climb on the tower in June except to enforce laws and regulations or to perform emergency operations. Originally the plan also contained a provision stating that commercial use licenses for June climbing guide activities would not be issued by the NPS for the month of June. *Id.* at 22. Plaintiffs filed a Motion for Preliminary Injunction seeking to enjoin Defendants from the commercial climbing ban during the month of June. This Court granted that motion in June of 1996. In December of the that year, Defendant issued a decision revoking the commercial climbing ban.

The Plaintiffs[3] challenge several practices adopted in the FCMP. While the FCMP no longer calls for a ban on

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[3] Plaintiff Bear Lodge Multiple Use Association ("BLMUA") is a voluntary, nonprofit corporation based in Hulett, Wyoming (near Devils Tower National Monument) whose goal is to develop management objectives for natural resources that maintain economic stability, public access and environmental sustainability and/or health, in and around local

commercial climbing in the month June, Plaintiffs argue that the Defendant wrongfully contends that it has the power to impose such a rule. Other provisions objected to by the Plaintiffs remain a part of the plan. These include the "voluntary" ban on climbing in June; an interpretive education program which explains the religious and cultural significance that the Monument has among some Native Americans; and finally, the placement of signs which encourage people to remain on the trail surrounding the Tower.

STANDARD OF REVIEW

Judicial review of agency action is governed by § 706 of the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706. The Plaintiffs in this case implicate the subsections of § 706 which require a reviewing court to hold

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communities. (Compl.¶ 1.) Plaintiff Andy Petefish, a member of BLMUA, is a resident of Wyoming, and is doing business as Tower Guides, a commercial guiding service that provides professional guides to assist persons in climbing Devils Tower. *Id.* ¶ 2. Plaintiff Gary Anderson, a member of BLMUA, is a citizen of Wyoming and has been climbing on Devils Tower for 12 years, including the month of June for each of those 12 years. *Id.* ¶ 3. Plaintiff Kenneth D. Allen, a member of BLMUA, is a resident of Hulett, Wyoming, and has been climbing on Devils Tower for more than 4 years, including the month of June for each of those 4 years. *Id.* ¶ 4. Plaintiff Gregory Hauber, a member of BLMUA, is a resident of Hulett, Wyoming, and has been climbing on Devils Tower for over a year, including the month of June. *Id.* ¶ 5. Plaintiff Wes Bush, a member of BLMUA, is a resident of Hulett, Wyoming, and has been climbing on Devils Tower for almost 2 years, including the month of June. *Id.* ¶ 6.

unlawful and set aside agency action, findings, and conclusions found to be: arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[4] "These standards require the reviewing court to engage in a 'substantial inquiry.' . . . An agency's decision is

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[4] 5 U.S.C. § 706 provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

entitled to a presumption of regularity, 'but that presumption is not to shield [the agency's] action from a thorough, probing, in-depth review.' " *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415, 91 S. Ct. 814, 823, 28 L.Ed.2d 136 (1971)).

Nevertheless, a court's review of an agency decision under this standard is "narrow and deferential," the court being required to uphold the agency's action if it has "articulated a rational basis for the decision and has considered relevant factors." *Mountain Side Mobile Estates Partnership v. Secretary of Housing and Urban Dev.*, 56 F.3d 1243, 1250 (10th Cir. 1995). "However, these limitations do not apply to questions of law. 'The [f]ailure to apply the correct legal standard or to provide . . . a sufficient basis to determine that appropriate legal principles have been followed is grounds for reversal.' " *Id.* (quoting *Nielson v. Sullivan*, 992 F.2d 1118, 1119-20 (10th Cir. 1993)).

In this case Plaintiffs contend that the NPS has stepped outside of the bounds imposed by law in two important ways. First they allege that the NPS's plan wrongfully promotes religion in violation of the establishment clause of the first amendment. Secondly, they argue that the NPS's own policies prohibit the types of actions adopted in the FCMP.

Commercial Climbing Ban

The Defendants assert that any challenge to the ban on commercial climbing at the Monument has now been mooted. In November of 1996 the NPS found that "at the current time there is no necessity to restrict commercial

guided climbing. . . . " (Administrative Record (A.R.) at 3066). As a result they did away with the mandatory commercial climbing ban that they had initially approved as part of the FCMP. Defendants now argue that this addendum to the FCMP moots Plaintiffs' challenge of the commercial ban. In the recent case of *Phelps v. Hamilton,* the Tenth Circuit provided a succinct description of the mootness doctrine. 122 F.3d 1309 (10th Cir. 1997). In that opinion it stated:

> The constitutional mootness doctrine is grounded in Article III's requirement that federal courts decide actual, ongoing cases or controversies. If an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed. The central question in determining whether a case has become moot is whether the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.

Id. at 1325 (internal quotation marks and citations omitted). In order to maintain jurisdiction over this particular issue "it is not enough that a dispute was very much alive when suit was filed," the controversy must be continuing and ongoing. *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 477, 110 S. Ct. 1249, 1253 (1990); *Fischbach v. New Mexico Activities Assoc.,* 38 F.3d 1159, 1160 (10th Cir. 1994).

The question in this case is whether the Department of Interior's decision to amend the management plan by

eliminating limitations on commercial climbing transforms this controversy into one of only historical significance.[5] Plaintiffs argue that the NPS's repeated representations that they have the power to ban commercial climbing in the manner originally proposed renders this a live controversy requiring court action. They go on to argue that the NPS's position necessitates a permanent injunction prohibiting the government Defendants from banning commercial climbing for any given period. (Plaintiff's Amended Complaint at 19.)

While the Court could permanently enjoin the NPS from instituting any commercial climbing ban, such an order would constitute relief to a hypothetical and nonexistent injury. Consequently, any permanent injunction at this stage would be futile. Whatever the Government's motives, the ban against commercial climbing is no longer a live controversy. For this Court to treat it as such would serve only an advisory purpose. Therefore the commercial climbing ban issue is moot and will not be addressed by this Court. However, it is important to note that any subsequent effort to resuscitate this ill-conceived ban would only serve to impair the Defendants' credibility with this Court.

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[5] In conducting this analysis this Court assumes that the withdrawal of the commercial climbing ban was not simply a contrivance to avoid the likelihood of a permanent injunction which was signaled by this Court's Order Granting Plaintiffs' request for preliminary injunctive relief.

Standing

Defendants contest the Plaintiffs' standing to challenge the FCMP's provision providing for a cultural interpretive program and the NPS's decision to place signs at the base of the Tower. Plaintiffs allege that the interpretive program adopted by the NPS promotes the religion of American Indians in violation of the establishment clause of the First Amendment. In particular, the Plaintiffs allege that the program proselytizes school children who visit the Monument under the guise of educating children about the heritage surrounding the Memorial. Defendants counter this by arguing that the Plaintiffs have failed to sufficiently allege that they have been injured by the program.

The United States Supreme Court summarized the standing requirements in the seminal case of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In *Lujan*, plaintiffs, several environmental organizations dedicated to wildlife conservation and other environmental causes, sought to challenge the Secretary of the Interior's reinterpretation of section 7(a)(2) of the SEA, 16 U.S.C. § 1536. In analyzing plaintiffs' standing, the Supreme Court summarized its recent holdings and outlined the three essential elements necessary to establish standing:

> [o]ver the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally-protected interest which is (a) concrete and particularized, (citations omitted) and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical,' (citations omitted).

> Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace [able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." (Citations omitted). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." (Citations omitted).

Id. at 560. Noting that the party invoking federal jurisdiction bears the burden of establishing these elements and of coming forward with evidence of specific facts which prove standing, the Supreme Court concluded that plaintiffs had failed to establish an "injury in fact," as well as redressability. *Id.* at 561, 567-68.

Establishing injury in fact requires "a factual showing of perceptible harm." *Id.* at 566 (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688, 93 S. Ct. 2405, 2416 (1973)). Key to the analysis of injury in fact is the nature of the injury suffered by the Plaintiffs themselves. "To satisfy Article III's case or controversy requirement, a litigant in federal court is required to establish its own injury in fact." *National Council for Improved Health v. Shalala*, 122 F.3d 878, 882 (10th Cir. 1997) (emphasis added). While a given action may cause severe and immediate harm to third persons, "a litigant may invoke only its own constitutional rights and may not assert rights of others not before the court." *Id.* The affidavits and materials submitted by Plaintiffs to establish standing in regard to the interpretive program fail to meet this threshold.

The only injury alleged by Plaintiffs relating to the interpretive program, is that children are being indoctrinated in the religious beliefs of Native Americans. The affidavits submitted to this Court establish that children from Hulett Public School take outings to the Monument which include exposure to the interpretive program at issue. They do not, however, establish that any of the parties are parents of these children or that any of the parents of these children are members of BLMUA. Although the Plaintiffs may feel that this ultimate conclusion is a logical inference there are no facts in the record supporting such a leap in logic. The Supreme Court has "repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *United States v. Hays*, 115 S. Ct. 2431, 2435 (1995). A generalized injury is all that Plaintiffs have established in regard to the interpretive program. Consequently, they have no standing to challenge its propriety.

Very similar arguments surround the Plaintiffs' challenge of the NPS's decision to place signs which ask visitors to the to stay on the trail surrounding the Tower. Plaintiffs assert that the sign coerces individuals into supporting and participating in Native American religions by not allowing them to approach the Tower. Defendants note that the Plaintiffs have failed to allege that they themselves have actually been hindered from approaching the Tower as a result of the sign. Plaintiffs respond by contending that BLMUA members who are parents of children have been injured because their children have been coerced into staying on the trail. The affidavits submitted in support of that contention once

again fail to establish standing. Plaintiffs have submitted the affidavits of Loretta Preuss, Linda Tokarczyk, and Debra Bush to substantiate this claim. While each individual states that they have been injured because their children have been coerced into complying with Native American religious beliefs, they have not alleged that they are members of BLMUA. For this Court to assume that the injury complained of somehow relates to the parties in this case would be to blindly step beyond the record before it. Because the record does not establish that the NPS's decision to place signs has injured these Plaintiffs, they have no standing.

Voluntary Climbing Ban

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion. . . . " (U.S. Const. amend. I) The Courts of this country have long struggled with the type and extent of limitations on government action which these ten words impose. At its most fundamental level, the United States Supreme Court has concluded that this provision prohibits laws "which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 15 (1947). Defining this prohibition on a case by case basis has proven a difficult endeavor, but the Court has developed a number of useful frameworks for conducting the analysis. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court established a three part test for delineating between proper and improper government actions. According to this test a governmental action does not offend the Establishment Clause if it (1) has a secular purpose, (2) does not have

the principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13. In a concurring opinion in the case of *Lynch v. Donnelly*, 465 U.S. 668 (1983), Justice O'Connor sought to clarify the Lemon analysis by focusing on whether the government action endorsed religion. "Applying Justice O'Connor's refined analysis, the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that religion or a particular religious belief is favored or preferred." *Bauchman v. West High School*, 132 F.3d 542, 551 (10th Cir. 1997). Noting the current disarray surrounding the analysis of Establishment Clause challenges, the Tenth Circuit has adopted the approach that an action must satisfy both prongs of Justice O'Connor's "endorsement" and Lemon's excessive entanglement test in order to be proper. *Id.* at 552.

Balanced in the analysis of the permissibility or impermissibility of the Government's actions is the ability of government to accommodate religious practices. The Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144 (1987). The Constitution actually "mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The Defendants acknowledge that the voluntary climbing ban is intended to confer benefits on Native American worshipers, but they contend this is appropriate accommodation falling well within the confines of the Establishment

Clause. "Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith . . . the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so." *Id.* at 678. This Court must look beyond the plain language establishing the climbing ban and examine its purpose and effects in order to determine if it is appropriate accommodation or if it breaches the necessary gap between state and religion fusing the two into one.

Purpose

The ability to accommodate religious practices is an important consideration in determining what constitutes a proper purpose under the *Lemon* test and Justice O'Connor's endorsement test. The Plaintiffs can succeed on this prong only if they show that the action has no clear secular purpose or that despite a secular purpose the actual purpose is to endorse religion. *Bauchman*, 132 F.3d at 554. The Supreme Court has noted that requiring a government action to serve a secular legislative purpose, "does not mean that the [policy's] purpose must be unrelated to religion." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 335 (1987). In cases of accommodation the Court has stated that "it is a permissible . . . purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 336.

In this case the Defendants contend that the climbing plan was designed, in part, to eliminate barriers to American Indian's free practice of religion. They argue that this type of accommodation is particularly appropriate in situations like this where impediments to worship arise because a group's sacred place of worship is found on property of the United States. Defendants assert that their actions are also aimed at fostering the preservation of the historical, social and cultural practices of Native Americans which are necessarily intertwined with their religious practices. While the purposes behind the voluntary climbing ban are directly related to Native American religious practices, that is not the end of the analysis. The purposes underlying the ban are really to remove barriers to religious worship occasioned by public ownership of the Tower. This is in the nature of accommodation, not promotion, and consequently is a legitimate secular purpose.

Effect

Accommodation also plays a role in considering whether the principal effect of a policy is to advance religion. The Supreme Court has said; "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities or influence." *Id.* at 337. "[O]n occasion some advancement of religion will result from governmental action." *Lynch*, 465 U.S. at 683. This is particularly true in cases of accommodation. Appropriate accommodation does not have a principal effect of

advancing religion. Appropriate accommodation, however, is a matter of degree. *See Amos*, 483 U.S. at 334-35. Actions step beyond the bounds of reasonable accommodation when they force people to support a given religion.

> The principle that the government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."

Lee v. Weisman, 505 U.S. 577, 587, 112 S. Ct. 2649, 2655 (1992) (quoting *Lynch*, 465 U.S. at 678).

In the context of the Free Exercise Clause, the Tenth Circuit drew a line demarcating impermissible accommodation in the area of public lands ruling that the "[e]xercise of First Amendment freedoms may not be asserted to deprive the public of its normal use of an area." *Badoni v. Higginson*, 638 F.2d 172, 179 (1980). The record clearly reveals that climbing at the Devils Tower National Monument is a "legitimate recreational and historic" use of Park Service lands. (FCMP at 2; A.R. at 410-12). If the NPS is, in effect, depriving individuals of their legitimate use of the monument in order to enforce the tribes' rights to worship, it has stepped beyond permissible accommodation and into the realm of promoting religion. The gravamen of the issue then becomes whether climbers are allowed meaningful access to the

monument. Stated another way, is the climbing ban voluntary or is it actually an improper exercise of government coercion?[6]

Plaintiffs argue that the "voluntary" ban is voluntary in name only. In support of their argument Plaintiffs note that the NPS has established a goal of having every climber personally choose not to climb at the Tower during June. (FCMP at 23). Plaintiffs also cite to possible modifications to the FCMP if the NPS deems the voluntary ban unsuccessful. Specifically, they draw the Court's attention to the fact that if the plan does not result in a significant reduction of climbers on Devils Tower each June, then the NPS may convert the closure to a mandatory closure.

Neither of these factors is sufficient to transform the voluntary ban into a coerced ban. The Park Service's stated goals are not the measure of coercion, rather the implementation of those goals is. The goal of reducing the number of climbers to zero may or may not be a desirable one[7], but coercion only manifests itself in the NPS's

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[6] Both Parties rely on the case of *Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 439 (1988), in an effort to support their respective cases. The Court has concluded that the *Lyng* case is largely irrelevant to the issues at hand. That case addresses the other side of the issues presented here, namely what accommodation is constitutionally required when American Indians consider public land sacred. Here, the Court must determine what type of accommodation is constitutionally permissible on lands considered sacred by American Indians.

[7] In fact, a complete elimination of climbing from the Tower in the month of June would serve as powerful evidence of actual coercion.

actions, not in its aspirations. The Park Service's stated goals would not be advanced at all by mandating that climbers not scale the Tower. Instead, it has stated that the "voluntary closure will be fully successful when every climber *personally chooses* not to climb at Devils Tower during June." (FCMP at 23. See A.R. 67.) (emphasis added). Ordering climbers not to climb or deterring climbing through intimidation undermines this goal and robs individuals of the personal choice necessary to accomplish it. Yet, the Park Service's hopes that climbers will adhere to the voluntary climbing ban cannot be viewed as coercive.

The other purported indicia of coercion also fails to establish that the voluntary climbing ban is, in fact, mandatory. Although the NPS has stated that an unsuccessful voluntary ban may lead it to make the ban mandatory, that is far from an inevitable result. To the contrary, the conversion to a mandatory ban is only one of eight options which the NPS may consider in the event of a failed voluntary ban. While a more direct threat of a mandatory ban in the wake of a failed voluntary ban could evidence coercion, the remote and speculative possibility of a mandatory ban found in this case is insufficient to transform the Government's action into a coercive measure.

Excessive Entanglement

The Court concludes that the voluntary climbing ban also passes muster when measured against the excessive entanglement test. To determine whether a given policy constitutes an excessive entanglement the Court must

look at "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Lemon*, 403 U.S. at 615. In making this analysis the Court must be mindful that "[e]ntanglement is a question of kind and degree." *Lynch*, 465 U.S. at 668. The organizations benefitted by the voluntary climbing ban, namely Native American tribes, are not solely religious organizations, but also represent a common heritage and culture. As a result, there is much less danger that the Government's actions will inordinately advance solely religious activities. The very limited nature of government involvement in this case also tends to undermine any argument of excessive entanglement. The government is merely enabling Native Americans to worship in a more peaceful setting. In doing so, the Park Service has no involvement in the manner of worship that takes place, but only provides an atmosphere more conducive to worship. This type of custodial function does not implicate the dangerously close relationship between state and religion which offends the excessive entanglement prong of the *Lemon* test. *See Westside Community Bd. of Educ. v. Mergens*, 496 U.S. 226, 253 (1990).

The CMP and the Park Service's own policies

Finally, Plaintiffs challenge the CMP as being contrary to the NPS's own policies. In support of their argument Plaintiffs cite to the NPS's *Native American Relationships Management Policy*, a policy which states that "religious activity at a particular place shall not form the basis for prohibiting others from using such areas."

Defendants contend that the policy cited by the Plaintiffs has since been updated and replaced. The new Management Policy states that "[p]erformance of traditional activities at a particular place will not be a reason for prohibiting the use of that area by others except where temporary closings are authorized by law. . . . " (Management Policy 8:9, A.R. 2787). Regardless of which management policy the voluntary climbing ban is measured against, there is no apparent conflict. As outlined above, the policy adopted does not prohibit the use of the Monument. Were such a ban mandatory, either explicitly or implicitly, it would likely violate the guidelines outlined in the Management Policy. The current policy, however, does not.

CONCLUSION

The Plaintiffs have challenged four aspects of the NPS's Final Climbing Management Plan. Three of these four challenges are not susceptible to judicial review. The fourth, the voluntary climbing ban, is a policy that has been carefully crafted to balance the competing needs of individuals using Devil's Tower National Monument while, at the same time, obeying the edicts of the Constitution. As such, the plan constitutes a legitimate exercise of the Secretary of the Interior's discretion in managing the Monument.

It is THEREFORE

ORDERED that the Secretary's decision to adopt the Final Climbing Management Plan is a lawful and legitimate exercise of his authority and is affirmed.

DATED this 2nd day of April, 1998.

/s/ Illegible
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BEAR LODGE MULTIPLE USE ASSOCIATION, et al.,	)	
Plaintiffs – Appellants,	)	No. 98-8021
v.	)	
BRUCE BABBITT, in his official capacity as United States Department of the Interior Secretary, et al.,	)	
Defendants – Appellees,	)	
CHEYENNE RIVER SIOUX TRIBE, et al.,	)	
Defendants – Intervenors – Appellees,	)	
GROUP OF CONCERNED SCHOLARS, et al.,	)	
Amici Curiae.	)	

ORDER

Filed October 6, 1998

Before **PORFILIO** and **BRISCOE**, Circuit Judges.

The motion of the Baptist Joint Committee, et al., to file a brief amicus curiae is granted. The brief submitted on October 1 will be shown filed as of today's date.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Illegible
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BEAR LODGE MULTIPLE USE ASSOCIATION; ANDY PETEFISH; GARY W. ANDERSON; GREGORY HAUBER,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 98-8021
BRUCE BABBITT, in his official capacity as United States Department of the Interior Secretary; et al.,	)	
Defendants-Appellees,	)	
CHEYENNE RIVER SIOUX TRIBE; et al.,	)	
Defendants-Intervenors-Appellees,	)	
GROUP OF CONCERNED SCHOLARS; et al.,	)	
Amici Curiae.	)	

ORDER

Filed August 18, 1999

Before, **PORFILIO, McKAY,** and **TACHA,** Circuit Judges.

Appellants' petition for rehearing en banc is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: /s/ Amy Frazier
Deputy Clerk

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

1. **General Jurisdiction of the Supreme Court:** U.S.C. Const. Art. III § 1, cl. 1, 2.

Section 1. Judicial Power, Tenure and Compensation.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * *

2. **Jurisdiction to Grant Certiorari**: 28 U.S.C. § 1254 – Courts of appeals; certiorari; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, 62 Stat. 928; June 27, 1988, Pub.L. 100-352, § 2(a), (b), 102 Stat. 662.)

* * *

3. **First Amendment to the United States Constitution:** U.S.C. Const. Amend. I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

DEVILS TOWER PLEASED WITH VOLUNTARY CLIMBING CLOSURE RESULTS

Implemented in 1995, the new climbing management plan at Devils Tower is off to an auspicious beginning according to monument officials. The voluntary June closure to climbing achieved an 85 percent compliance rate in its first year. The voluntary closure concept was initiated as a show of respect for American Indians who consider the tower sacred. "This is an excellent effort for the first year of the plan. The bulk of the climbing community is to be commended for its good faith participation in both the plan and the planning process," Superintendent Deb Liggett announced today. "We look forward to an even higher rate of compliance next year."

Also as part of the climbing plan, a special series of American Indian traditional cultural demonstrations were held each weekend in June. Chief Ranger Jim Schlinkmann reports, "The special interpretive programs were very well received by our visitors."

In June of 1995, 193 climbers scaled the fluted sides of the 867-foot butte compared to 1,293 in June of 1994. Most international climbers were unaware of the new climbing management plan and both European and Canadian Climbers make up a significant percentage of this year's climbers.

A small number of American climbers were unaware of the new plan. By and large, most American climbers knew of the plan and either could not change their plans this year or chose not to respect the voluntary closure. A single commercial climbing guide and the parties who accompanied him accounted for approximately one third

of the climbing activity during June. Eight out of the nine licensed commercial climbing guides at the tower chose to respect the voluntary closure.

"If the climbing community can self-regulate at Devils Tower, I believe they will be given the opportunity to do this on other public lands. The self-regulation model could be an exciting opportunity for many recreational user groups around the nation. This is an exciting time to be at Devils Tower," states Liggett. "We are watching diverse user groups support a plan that is based on mutual respect."

The voluntary June closure was initiated in 1995 after a two-year planning effort on the part of the National Park Service and several interested groups. Through the Climbing Management Plan, the National Park Service treats the tower for the first time as both a natural and a cultural resource.

The plan stipulates no new climbing bolts but permits the replacement of existing bolts. Additional raptor protection, increased resource monitoring, and a cross-cultural educational program are all key elements of the plan. "The success of the plan relies on the ability of the climbing community to self-regulate and on our ability to educate," emphasizes Liggett. "American Indians, climbers, and the agency must continue to work together to succeed."

Final Climbing Management/ Finding of No Significant Impact

Devils Tower National Monument
Crook County, Wyoming

This Final Climbing Management Plan (FCMP)/Finding of No Significant Impact (FONSI) for Devils Tower National Monument sets a new direction for managing climbing activity at the tower for the next three to five years. Its purpose is to protect the natural and cultural resources of Devils Tower and to provide for visitor enjoyment and appreciation of this unique feature. The tower will be managed as a significant natural and cultural resource. The National Park Service will manage Devils Tower as primarily a crack climbing site in such a way that will be more compatible with the butte's geology, soils, vegetation, nesting raptors, visual appearance, and natural quiet. Recreational climbing at Devils Tower will be managed in relation to the tower's significance as a cultural resource. No new bolts or fixed pitons will be permitted on the tower, though replacement of existing bolts and fixed pitons will be allowed. In this way, the NPS intends that there be no new physical impacts to Devils Tower.

In respect for the reverence many American Indians holds for Devils Tower as a sacred site, rock climbers will be asked to voluntarily refrain from climbing on Devils Tower during the culturally significant month of June. The monument's staff will begin interpreting the cultural significance of Devils Tower for all visitors along with the

more traditional themes of natural history and rock climbing.

There are many benefits to the implementation of the FCMP. The environmental consequences of the FCMP will include increased protection for natural resources. No critical habitat for listed species will be negatively affected. Visitor experience will be enhanced by a more diverse and balanced interpretive program. In turn, improved communication and understanding among the monument's user groups will lead to greater respect and tolerance for differing perspectives.

The FCMP considered a full range of alternatives. In addition to Alternative D, the preferred climbing management plan, the other alternatives considered under the Draft Climbing Management Plan/Environmental Assessment (DCMP/EA) included: Alternative A, which allowed for virtually unlimited and unrestricted year around climbing and bolting. Alternative B, which proposed no change from current management. Alternative C, which proposed phasing in a voluntary June closure to climbing over three years and allowing for regulated new bolting. Alternative E, which included a mandatory June closure to climbing and prohibiting any placement of bolts, and Alternative F, which proposed to immediately close the tower to all climbing year around and called for the removal of all climbing gear from the tower. The official 90-day review period for this document ended on October 31, 1994.

* * *

Recreational climbing at Devils Tower has increased dramatically from 312 climbers in 1973 to over 6,000 annually. New route development in the last ten years resulted in accelerated route development and bolt placement. Today the tower has about 220 named routes. Approximately 600 metal bolts are currently embedded in the rock along with several hundred metal pitons. Devils Tower is world famous for its crack climbing, which depends primarily on removable protection placed by climbers in cracks.

Activities performed by the numerous climbers on the tower during the spring through fall climbing season have affected nesting raptors, soil, vegetation, the integrity of the rock, the area's natural quiet, and the rock's physical appearance. Some American Indians have complained that the presence of climbers on the sacred butte and the placement of bolts in the rock has adversely impacted their traditional activities and seriously impaired the spiritual quality of the site.

ISSUES

In response to the many climbing issues at Devils Tower, the National Park Service began preparing a Draft Climbing Management Plan (DCMP)/Environmental Assessment (EA) in 1992. The DCMP's preferred alternative and five other alternatives addressed the monument's objectives to: 1) preserve and protect the monument's natural and cultural resources for present and future generations, 2) manage recreational climbing on the tower, 3) increase

visitor awareness of American Indian beliefs and traditional cultural practices at Devils Tower, and 4) provide the monument with a guide for managing climbing use that is consistent with National Park Service management policies and other management plans at Devils Tower National Monument.

THE PREFERRED ALTERNATIVE AND THE OTHER ALTERNATIVES

The No Change Alternative and five other alternatives, including the Preferred Alternative, were analyzed in the DCMP. The anticipated effects of the alternatives informed management and the public of the potential impacts of the different strategies. The No Change Alternative was described in detail to provide a baseline from which the reader could respond to the issues and proposals. The other alternatives provided different management options that answered the above listed objectives with varying levels of success.

All proposed alternatives contained some common elements including: 1) developing a long-term resources monitoring program that will include conducting a Visitor Education and Resource Protection plan, 2) a cross-cultural education program that will interpret all historic uses of the monument, 3) revising the climber

* * *

OBJECTIVES

The climbing management objectives for Devils Tower National Monument are:

- To preserve and protect the monument's natural and cultural resources for present and future generations.
- To manage recreational climbing on the tower.
- To increase visitor awareness of American Indian beliefs and traditional cultural practices at Devils Tower.

* * *

The current climbing registration system will be used to measure compliance with the closure. Generally, closure success is expected to be determined by evaluating climber registration data and conferring with the work group members and other monument user groups including climbers and American Indians. The following factors will be considered in evaluating success.

- Some elements of a successful voluntary closure will include:

    a) a continuous, significant reduction in the number of climbers on Devils Tower each June in comparison to the number of climbers from the previous June

    b) an increase in awareness among all monument visitors of the cultural significance of Devils Tower to American Indians and the conflicting values between recreational climbing and the sacred site

The voluntary closure will be fully successful when every climber personally chooses not to climb at Devils Tower during June out of respect for American Indian cultural values. This is the ultimate goal of the voluntary June closure.

- Some elements of an unsuccessful voluntary closure will include:
    a) an increase, no change, or insignificant decrease in the number of climbers on Devils Tower each June in comparison to the number of climbers from the previous June
    b) an increase in the number of unregistered climbers at Devils Tower
    c) an increase in conflicts between user groups
    d) disruptions of park activities
- A determination of success by the NPS for the voluntary June closure is not expected for at least three years or as long as five years. Time is needed to insure the concurrent educational program has a chance to perform its mission. If the voluntary closure is determined to be unsuccessful, several actions by the NPS could take place including, but not limited to the following:
    a) revise the climbing management plan
    b) reconvene a climbing management plan work group
    c) institute additional measures to further encourage compliance
    d) change the duration and nature of the voluntary closure
    e) convert the June closure to mandatory
    f) write a new definition of success for the voluntary closure

The language regarding the voluntary closure has changed between the DCMP and the FCMP. The DCMP

stated that the June closure "would become mandatory" if unsuccessful. This has been changed here in the FCMP to read "could" become mandatory. This will provide the NPS more management flexibility in the future.

It is within the existing authority of the monument superintendent to close areas to certain activities to protect natural and cultural resources. The NPS believes that self-regulation by climbers, augmented by the cross-cultural education program, is a preferable course of action. Neither the NPS or the Department of the Interior's Office of the Solicitor believes the FCMP will violate the constitutional rights of any citizen.

The closures described in the FCMP are for managing an activity, climbing, not general access to national park land. The NPS maintains that future management actions could take place including a mandatory closure. The mandatory closure language is present to show that we are seriously committed to protecting a cultural resource and to acknowledge American Indian concerns. The NPS has the authority to implement a mandatory June closure, but hopes this will not be necessary. The climbing community has repeatedly asked that they be permitted to self-regulate. The FCMP gives climbers the opportunity to do so.

* * *

The reason why the NPS has decided to advocate a voluntary June closure to climbing is to promote understanding and encourage respect for the culture of the American Indian tribes who are closely affiliated with Devils Tower as a sacred site. Until very recently, the importance of American Indian cultural values at Devils

Tower has been neglected by the NPS. Recreational climbing, which has been highlighted here in the past, derogates these cultural values to many. The closure period is a time when the monument's interpretive program emphasizes American Indian culture. The monument will present a balanced interpretive program on a year around basis. In so doing, the NPS hopes to help preserve a part of America's cultural heritage and promote amicable relations between American Indian societies and the prevalent western society in America.

* * *

Other traditional American Indian activities that may have been conducted in the monument include winter camps, hunting activities, vision quests, and burials. American Indians are very private about their traditional cultural practices, including religious ceremonies. There is insufficient research to indicate one band affiliation with the monument to be stronger than another. All the American Indian activities performed are not completely known, neither are the times and locations of those activities.

The tower was evaluated in 1994 and was determined to be eligible for the National Register of Historic Places as a traditional cultural property for its American Indian relationships.

A thorough ethnographic study is needed to implement the long-term natural and cultural resources monitoring program and cross-cultural interpretive program. This research also will help identify American Indian lifeways and address their concerns more accurately and reasonably.

Impacts Under the FCMP. Some adverse effects that an ethnographic study and interpretive program may have is the feeling by American Indians that their private ceremonies are being exploited and put on display. Concern was expressed by some American Indians during the scoping process that National Register listing for Devils Tower could bring increased public attention to their sacred site. Prior to any NPS ethnographic study, cross-cultural interpretive program, or National Register nomination, appropriate consultation with American Indian people will occur to alleviate as many impacts to traditional cultural beliefs and practices as possible.

A cross-cultural interpretive program is intended to broaden the respect and understanding of diverse user groups at Devils Tower.

Climbers will affect American Indian traditional beliefs less and less through the years. In time, climbers will not impact American Indian traditional cultural practices during the month of June. Climbers will show respect for American Indian concerns through their willingness to avoid climbing the tower in June.

Overall, the FCMP will help preserve our cultural heritage and help promote amicable relations between Indian societies and the prevalent western society in the United States.

* * *

DEVILS TOWER NATIONAL MONUMENT

RECONSIDERATION OF CERTAIN LIMITATIONS OF THE FINAL CLIMBING MANAGEMENT PLAN

BACKGROUND

In February, 1995, the National Park Service (NPS), after the completion of a public planning process and issuance of a related environmental assessment, completed a Final Climbing Management Plan (FCMP) to detail specific actions for managing technical rock climbing at Devils Tower National Monument (Monument). Among other matters, this plan states that Devils Tower will be managed as a cultural resource as well as a natural and recreational resource. The FCMP generally adopts limitations on climbing at the Monument necessary for the protection of physical aspects of the tower, such as limiting the use of bolts and pitons and closing climbing routes to avoid disturbance of wildlife.

The FCMP also includes a program for voluntary closure of the Monument to technical rock climbing in the month of June. The FCMP further provides that, to be consistent with this voluntary closure, NPS will issue no commercial guided climbing licenses for the month of June. These actions generally are based on a desire by NPS to accommodate American Indian tribal religious and cultural practices at the Monument.

Since the adoption of the FCMP in February 1995, three things have occurred which caused NPS to reconsider these aspects of the FCMP.

First, on May 24, 1996, Executive Order No. 13007 was issued. Under this order, federal land management agencies such as the NPS are (to the extent permitted by law, practicable, and not clearly inconsistent with essential agency functions) to accommodate access to and ceremonial use of sites sacred to federally recognized Indian tribes by tribal religious practitioners, and, to avoid adversely affecting the physical integrity of such sacred sites.

Second, on June 8, 1996, the United States District Court for the District of Wyoming issued a preliminary order, finding a substantial likelihood that the restriction in the FCMP against issuing commercial guided climbing licenses for the month of June would be held to violate the Establishment Clause of the United States Constitution.

Third, after June of this year, the NPS reviewed the results of the fist two years of climbing use under the FCMP. During both June 1995 (because of a grace period for commercial guided climbing) and most of June 1996 (because of the court action)

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Current Cultural/Religious Practices at the Monument

* * *

Since the tower is considered to be the sacred focal point of these ritual activities, it is important to Indian tribal practitioners that it remain in a condition resembling that which existed in historic times. Alterations to the rock, the placement of climbing equipment, and the presence of highly visible and audible persons on the tower, have

been described as offensive, insensitive and distracting. Climbing and its related alterations to the nature of the tower are considered by tribal members to be incompatible with the traditional activities conducted there. It has also been said that the sight and sounds of climbers on the tower during prayers, ceremonies, or the passing of knowledge from elder to child, confound the purposes of these activities.

ALTERNATIVES CONSIDERED

In the development of the FCMP, the NPS considered a number of alternatives before determining that the June voluntary closure program and related actions best accommodate the needs of tribal members with the least impact on use by other visitors to the Monument. The principal alternatives considered included the possibility of a mandatory climbing closure, a closure time period other than June, the closure of only a portion of the tower, a shorter closure period, an intermittent closure period, and a distinction between commercial guided climbing and general climbing.

In this reconsideration, the NPS reviewed the alternatives it selected in the FCMP as well as those it did not adopt. NPS has generally determined to continue a voluntary closure for the reasons stated in the FCMP. A discussion of other principal alternatives follows.

Smaller Closure Area

NPS considered whether a closure of only a portion of the climbing area of the tower would be an effective means to

accommodate tribal cultural and religious practices. This suggestion, in fact, was brought up in work group scoping meetings. Limiting the voluntary closure to only a portion of the tower would provide some benefits in this regard as the climbing would not be visible or audible from other portions of the Monument. In theory, it would be possible to isolate climbing and religious activities so as to avoid visible and audible impacts on religious and cultural practices.

However, NPS determined then and continues to believe that this solution would fall short of sufficiently accommodating American Indian cultural and religious practices. This is because the tower is considered as a totality by tribes with respect to its sacred and cultural values. Thus, they believe that climbing, particularly in the month of June, even if not visible or audible, intrudes upon the values of the tower and is disruptive to cultural and religious practices.

* * *

DECLARATION OF JIM BLACK

I, Jim Black, in accordance with the requirements of 28 U.S.C. § 1746, declare as follows:

1. My name is Jim Black. I am an adult, a resident of the State of Colorado, and a citizen of the United States.

2. I am a member of Bear Lodge Multiple Use Association.

3. This Declaration is made in support of Plaintiffs' Opening Brief filed in the above entitled action.

4. I enjoy rock climbing. I have climbed Devils Tower National Monument (Devils Tower) in the past, and I intend to climb it in the future.

5. I am aware that in its Final Climbing Management Plan (CMP) for Devils Tower the National Park Service (NPS) has implemented what it describes as a "voluntary" closure to climbing during June of each year beginning in June of 1995.

6. I wanted to climb Devils Tower in June of 1996 but refrained from climbing because the NPS states that if all climbers do not "voluntarliy" refrain from climbing during the month of June, the closure may be made mandatory and/or the period of the closure may be extended.

7. I also did not climb in June of 1996 because I have many friends who are climbers and I do not want to be responsible for causing the NPS to adopt a mandatory

closure or a closure that is longer than the June "voluntary closure."

8. I understand that the NPS believes that it has the authority to make the June closure mandatory and/or to lengthen the time of the climbing closure.

9. I understand the word "voluntary" to mean that I have the freedom to choose my actions without fear of loss of rights I enjoyed before I was asked to give upon those rights "voluntarily.". But that is not how the NPS uses the word "voluntary" regarding Devils Tower. The NPS maintains that if I do not "voluntarily" decline to climb during June, it will take action to close access to Devils Tower. I view the threat by the NPS of a mandatory closure for the month of June or a longer period of closure as set forth in the CMP as a threat, a threat that is coercive since it is retaliatory. If I climb during the month of June, the NPS will take away from me and many of my

* * *

DECLARATION OF ELAINE BIANCO

I, Elaine Bianco, in accordance with the requirements of 28 U.S.C. § 1746, declare as follows:

1. My name is Elaine Bianco. I am an adult, a resident of the State of Oklahoma, and a citizen of the United States.

2. I am a member of Bear Lodge Multiple Use Association.

3. This Declaration is made in support of Plaintiffs' Opening Brief filed in the above entitled action.

4. I enjoy rock climbing. I have climbed Devils Tower National Monument (Devils Tower) in the past, and I intend to climb it in the future.

5. I am aware that in its Final Climbing Management Plan (CMP) for Devils Tower the National Park Service (NPS) has implemented what it describes as a "voluntary" closure to climbing during June of each year beginning in June of 1995.

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SURVEY OF DEVILS TOWER CLIMBERS

* * *

The fourth item concerned climber perception of the potential conflict with Native American views about the use of the tower. Climbers were asked if their views about climbing the tower would change if they knew that Native Americans considered it a sacred site and objected to climbing. Table 14 indicates that 67% of the climbers in the sample said that their views on climbing would not change and that they would continue to climb the tower. Fourteen percent were equivocal, stating that although their views might be altered, they would require additional information about Native American beliefs and concerns before making a decision. Almost one-fifth (19%) of the climbers indicated that they would stop climbing at the tower if Native Americans objected to it.

	Frequency	Percentage
No, Views Would Not Change	28	67
Equivocal, May or May Not Change	6	14
Yes, Views Would Change	8	19
TOTALS	42	100

Table 14. Climbing Views and Native American Objections

The data from these four items suggest that this sample of climbers is relatively aware of the fact that

Native Americans have some special use and concerns regarding the tower. However, it also suggests that this level of awareness is not necessarily related to climber views about their own use of the tower. Many of the climbers we interviewed who were aware of Native American objections to climbing suggested that their own rights to the use of the tower included the right to climb. Also, many of the climbers indicated that they did not feel any conflict of use was present, that their climbing in no way conflicted with Native American use.

* * *